United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

279

No. 17,192

LEO SADE, ET AL.,

Appellants,

v.

NATIONAL SURETY CORPORATION,

Appellee.

Appeal from an Order of the United States District Court
for the District of Columbia

CHARLES P. MULDOON

RAYMOND W. BERGAN

1000 Hill Building
Washington 6, D. C.

Counsel for Appellants

Of Counsel:

WILLIAMS & STEIN
1000 Hill Building
Washington 6, D. C.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the District Court erred in its holding that the loss in question was not covered by Clause B of the "Broker's Blanket Bond" issued by the appellee.

2. Whether the District Court erred in permitting the defendant-appellee to file an amended answer, after trial, raising a defense not found in either the answer, the pre-trial statement or the pre-trial order.

3. Whether the District Court erred in denying the plaintiffs-appellants' motion for a new trial.

INDEX

	Page
JURISDICTIONAL STATEMENT	1
STATEMENT OF CASE	2
STATEMENT OF POINTS	5
SUMMARY OF ARGUMENT	5
ARGUMENT:	
I. The Loss is Compensible Pursuant to Clause (B)	5
II. The "Trading Loss" Exclusion is of no Aid to Appellees	13
A. The Exclusion was not Pleaded	13
B. The Exclusion was not a Part of Pre-Trial Proceedings	14
C. The Exclusion Does Not Assist the Appellee	17
III. The Trial Court Erred in Denying Appellants' Motion for a New Trial	20
CONCLUSION	22

TABLE OF AUTHORITIES

Cases:

* Andrist v. Union Pac. Ry. Co., 30 Fed. 345 (D. Colo. 1887)	21
Bank of Altenburg v. Fidelity & Casualty Co., 118 F. Supp. 529 (E.D. Mo. 1953), aff'd 216 F. 2d 294 (8th Cir. 1954)	6, 12
Bernard v. U.S. Aircoach, 117 F. Supp. 134 (S.D. Cal. 1953)	6
Blanken v. Bechtel Properties, Inc., 194 F. Supp. 638 (D. D.C. 1961)	7, 15
Community Fed. Sav. & L. Ass'n v. General Casualty Co., 274 F. 2d 620 (8th Cir. 1960)	14
Conlon v. Tennant, 110 U.S. App. D.C. 140, 289 F. 2d 881 (1961)	15

Page

* Federal Deposit Ins. Corp. v. Hartford Acc. & Ind. Co., 106 F. Supp. 602 (E.D. Mo. 1952), aff'd 204 F. 2d 933 (8th Cir. 1953) 6, 12

Fidelity Trust Co. v. American Surety Co. of N.Y., 268 F. 2d 805 (3rd Cir. 1959) 13, 19

Johnson v. Giffen, ___ U.S. App. D.C. ___, 294 F. 2d 197 15

* Lopez v. U.S. Fidelity & Guarantee Co., 19 F.R.D. 59 (D. Ala. 1955) 6, 13

McCarthy v. Lerner Stores Corporation, 9 F.R.D. 31 (D. D.C. 1949) 16

* Meadow Gold Products Co. v. Wright, 108 U.S. App. D.C. 33, 278 F. 2d 867 (1960) 7, 15

Miller v. Brazil, 300 F. 2d 283 (10th Cir. 1962) 16

* National Bank of Paulding v. Fidelity & Casualty Co., 131 F. Supp. 121 (W.D. Ohio, 1954) 6, 12

National Union Fire Insurance Co. v. Santos, 303 F. 2d 309 (9th Cir. 1962) 16

* Paddleford v. Fidelity & Casualty Co. of N.Y., 100 F. 2d 606 (7th Cir. 1938) 7, 12, 13

* Payne v. S. S. Nabob, 302 F. 2d 803 (3rd Cir. 1962) 7, 16

* Standard Oil Co. of N.J. v. United States, 340 U.S. 54 (1952) 7, 19

United States v. Yellow Cab Company, 338 U.S. 338 (1949) 6, 8

Walker v. West Coast Fast Freight, Inc., 233 F. 2d 939 (9th Cir. 1956) 16

Statutes and Rules:

28 U.S.C. 1291 1

D.C. Code, § 11-306 1

* D.C. Code, § 14-306 21

D.C. Code, § 22-1410 12

D.C. Code, § 22-2201 12

Rules 8 (c) and (d), Federal Rules of Civil Procedure 6

* Rule 16, Federal Rules of Civil Procedure 6

Rule 52 (a), Federal Rules of Civil Procedure 6

Rule 59 (b), Federal Rules of Civil Procedure 20

* Rule 12 (f), Rules of the United States District Court for the District of Columbia 6

* Authorities principally relied upon.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 17,192

LEO SADE, ET AL.,

Appellants,

v.

NATIONAL SURETY CORPORATION,

Appellee.

Appeal from an Order of the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court was predicated upon the Act of February 27, 1877, 19 Stat. 253, as amended, D.C. Code Section 11-306. The jurisdiction of this Court is based upon the Act of October 31, 1951, 65 Stat. 726, 28 U.S.C. 1291.

STATEMENT OF THE CASE

This case originated in the District Court as a suit by Leo Sade, and others, trading as Sade & Co., stock brokers, against National Surety Corporation for recovery under the provisions of a blanket bond which National Surety had issued to Sade. Sade's loss had been occasioned as a result of the fraudulent activity of one Stanley Sekular, a customer, allegedly in conspiracy with one Thomas Guren, a Sade employee.

Thomas Guren was first employed by Sade & Co. in July of 1958 and sometime subsequent thereto was accepted by both the New York and the American Stock Exchanges as a registered representative. Guren was apparently a long-time friend and associate of Stanley Sekular whom he contacted in August of 1959 with respect to the purchase of Television Shares Management Company, "a large mutual fund management organization controlling assets in the neighborhood of four million dollars" (J.A. 129). Television Shares Management was to issue its first public offering of stock, over-the-counter, on August 10, 1959. Sekular purchased, through Guren and Sade, 2300 shares of stock at $26.50 per share and $26.25 per share, the total purchase price aggregating $61,440.55 including commissions.

Guren received a signed blank check from Sekular which, when given to Sade and then tendered by him for deposit (the amount of the purchase having been filled in) was dishonored by Sekular's bank for insufficient funds. During the critical period -- the time between Sekular giving the check to Guren and Sade presenting it for deposit -- Sekular's account had a balance of $300.00.

Upon dishonor, various efforts were made to recoup the loss and, finally, Sekular was advised by telegram that his account would be sold out in full if he did not make good the balance due in three days. A drop in the market occurred at approximately this time and when the Sekular account was sold out, Sade & Co. incurred a loss in excess of $18,000, the amount sued for in the District Court.

A complaint was filed on the bond on March 1, 1960, alleging the connivance of Sekular and Guren and seeking recovery under a provision of the bond covering:

> "(A) Any loss through any dishonest, fraudulent or criminal act of any of the Employees, committed anywhere, and whether committed alone or in collusion with others, including loss of Property through any such act of any of the Employees" (J.A. 145).

At pretrial this claim was allowed to be broadened to encompass a second provision of the bond:

> "(B) Any loss of Property through robbery, burglary, common-law or statutory larceny, theft, hold-up, or other fraudulent means . . . while the property is (or is supposed to be) lodged or deposited within any offices or premises located anywhere, except . . ." (J.A. 145).

The defendant interposed a general denial and affirmative defenses that the plaintiff was at fault in failing properly to manage the business, that the loss resulted not from employee collusion and that the plaintiffs failed to minimize damages (J.A. 4). Trial commenced in December of 1961 and lasted for three days.[1] Guren testified as a witness for the defense but Sekular was unavailable (J.A. 139) as was his wife. After the close of the case, the defendant moved for leave to file a supplemental answer setting forth the defense that the loss in question fell within a "trading loss" exclusion in the bond (J.A. 104-6). The exclusion reads:

> "Section 1. This Bond does not cover:
>
> * * * * *
>
> (g) Any loss resulting directly or indirectly from trading, with or without the knowledge of the Insured, in the name of the Insured or otherwise, whether or not represented by any indebtedness or balance shown to be due the Insured on any customer's account, actual or fictitious, except when covered under Insuring Clause (A), (D) or (E)" (J.A. 151).

---

[1] The general nature of the testimony has been set forth. The specifics are discussed in the Argument.

Over objection by the plaintiff (J.A. 106) and despite the fact that this exclusion in the bond coverage had been raised neither in the answer (J.A. 4) nor at pretrial (J.A. 8, 14), the trial judge permitted the amendment (J.A. 105) and subsequently ordered a new hearing to determine the applicability of the exclusion (J.A. 107-9).

The resumed hearing was held in March of 1962 and testimony taken with respect to the meaning of the "trading loss"exclusion. At this supplemental hearing, Leo Sade testified, as did Joseph Dyer Riviera, a stock-broker and President of Riviera, Marsh & Co. (J.A. 118-19), and William G. Russel, an insurance broker (J.A. 125). These persons testified that in their view the exclusion did not negate coverage under the circumstances shown (J.A. 122, 126). Following this renewed hearing, the trial judge, Honorable Luther W. Youngdahl, filed a memorandum opinion (J.A. 127-37) in which he concluded that the plaintiff was not entitled to recover. The court concluded that the evidence was insufficient to support indemnification under Clause (A) of the bond (employee misconduct) (J.A. 131-3) and that Clause (B) (on premises loss) did not apply to the type of activity shown (J.A. 134). Moreover, the court continued, even if Clause (B) would support recovery, section 1(g) (the "trading loss" exclusion) would bar recovery (J.A. 135). A judgment was entered dismissing the plaintiffs' complaint (J.A. 137-8).

Following entry of judgment, the plaintiffs moved for a new trial upon the grounds that a witness was now available to them who had not been available during either the pretrial proceedings or the trial (J.A. 138-9). The witness was Ann Lewis Sekular, wife of the principal culprit. It was reported to the trial court that Mrs. Sekular had not been available for pretrial discovery because of the marital privilege, that she could not be found during the trial, that she had subsequently been divorced and was nowavailable as a witness (J.A. 139). The importance of such testimony in view of the difficulty which the plaintiffs had in proving Guren-Sekular collusion, employee dishonesty and

coverage under Clause (A) of the bond is obvious. The motion was denied (J.A. 141-2). Timely notice of appeal was filed (J.A. 143) to bring the case to this Court.

STATEMENT OF POINTS

1. The District Court erred in holding that the evidence did not disclose a set of facts invoking coverage under either Clause (A) or (B) of the bond in question. Coverage under Clause (B) was clearly shown.

2. The District Court further erred in holding that the "trading loss" exclusion precluded coverage under Clause (B) of the bond. The "trading loss" exclusion should not have been in the case at all, not having been pleaded in the answer or adverted to during pretrial. Even if considered in the case, it does not, when properly construed, operate to deny coverage.

3. The District Court erred in denying the plaintiffs' motion for a new trial. The obvious difficulties besetting the plaintiffs in the presentation of their case -- particularly as applied to employee dishonesty under Clause (A) of the bond -- was made even more pronounced by the inability to require Mrs. Sekular to testify against her husband. That difficulty removed, the interests of justice require that the plaintiffs be given an unimpeded opportunity to prove their case.

SUMMARY OF ARGUMENT

The plaintiffs had lost in excess of $18,000 as a result of the dishonesty of Stanley Sekular and, in their view, the collusion of an employee, Thomas Guren. Seeking recovery under a blanket bond, the plaintiffs premised their right to recovery on two provisions of that bond -- one relating to employee dishonesty, the other covering any loss occurring on the premises. The evidence clearly demonstrated that Sekular had misrepresented his financial status to Sade & Co. through

its authorized representative and that he was quite clearly guilty at least of violating D.C. Code §27-1410 (the bad check statute). With respect to Guren's collusion, the appellants must concede for the purposes of this appeal that, while the evidence is subject to conflicting inferences, the Court's conclusion that such collusion was not shown is supported by substantial evidence and is not now open to reevaluation. United States v. Yellow Cab Company, 338 U.S. 338, 342 (1949); Rule 52(a), F.R. Civ. P. The matter will not be further pressed in this Court.

With respect, however, to coverage by Clause (B) of the policy (on premises loss), the appellants submit that the loss incurred is compensible thereunder. National Bank of Paulding v. Fidelity & Casualty Co., 131 F. Supp. 121 (W.D. Ohio 1954); Federal Deposit Ins. Corp. v. Hartford Acc. & Ind. Co., 106 F. Supp. 602 (E.D. Mo. 1952), aff'd 204 F.2d 933 (8th Cir. 1953); Bank of Altenburg v. Fidelity & Casualty Co., 118 F. Supp. 529 (E.D. Mo. 1953), aff'd 216 F.2d 294 (8th Cir. 1954).

Defendant-appellee seeks to avoid the impact of Clause (B) by reliance upon an exclusion contained in the policy -- paragraph 1(g), the so-called "trading loss" exception. This claim does not belong in the case. Exceptions to insurance coverage must be pleaded by way of affirmative defense, Lopez v. U.S. Fidelity & Guarantee Co., 19 F.R.D. 59 (D. Ala. 1955); not being contained therein, it is deemed waived and may not be later asserted. Rules 8(c) and (d), F.R. Civ. P.; Bernard v. U.S. Aircoach, 117 F. Supp. 134 (S.D. Cal. 1953). There is another, and equally serious hurdle, to the consideration of such a defense. Not only was it not asserted by way of answer, the pre-trial statement of the defendant and the pre-trial order can be searched in vain for an indication that reliance is placed on such a defense. It was, therefore, not properly injected into the case; the court erred in permitting supplemental pleading, and the defense may not be considered. Rule 16, F.R. Civ. P.; Rule 12(f), Rules of the United States District Court for the District of

Columbia; Meadow Gold Products Co. v. Wright, 108 U.S. App. D.C. 33, 278 F.2d 867 (1960); Blanken v. Bechtel Properties, Inc., 194 F. Supp. 638, 642 (D.D.C. 1961); Payne v. S.S. Nabob, 302 F.2d 803 (3rd Cir. 1962). Even if such a defense could properly have been considered, it should have been rejected on the merits. Paddleford v. Fidelity & Casualty Co. of N.Y., 100 F.2d 606 (7th Cir. 1938). Particularly should this have been so in view of the uncontradicted expert testimony as to the effect of such a provision and the rule of construing ambiguities in favor of the insured, Paddleford, supra, and in accordance with business and insurance understanding. Standard Oil Co. of N.J. v. United States, 340 U.S. 54, 60 (1952).

In the District of Columbia, a spouse is a competent, but not a compellable, witness to his or her mate's wrongdoing. Mrs. Sekular falls within this proscription. While married, she was not amenable to process to compel testimony against her husband. After divorce -- after trial -- she would have been available and compellable. The Court erred, therefore, in denying a new trial at which she could have been heard. Especially should this be so in view of the heavy burden the plaintiffs had to carry to prove Clause (A) coverage.

ARGUMENT

I

THE LOSS IS COMPENSIBLE PURSUANT TO CLAUSE (B)

At trial the plaintiffs relied on two distinct portions of the bond, known during the course of proceedings as Clause (A) (employee dishonesty) and Clause (B) (on premises loss). These provisions read as follows:

"FIDELITY

(A) Any loss through any dishonest, fraudulent or criminal act of any of the Employees, committed anywhere and whether committed alone or in collusion

with others, including loss of Property through any such act of any of the Employees.

ON PREMISES

(B) Any loss of Property through robbery, burglary, common-law or statutory larceny, theft, hold-up, or other fraudulent means, misplacement, mysterious unexplainable disappearance, damage or destruction, abstraction or removal from the possession, custody or control of the Insured (whether effected with or without violence or with or without negligence on the part of any Employee), and any loss of subscription, conversion, redemption or deposit privileges through the misplacement or loss of Property, while the Property is (or is supposed to be) lodged or deposited within any offices or premises located anywhere, except while in the mail or in any of the Insured's offices specifically excluded from the coverage of this bond or with a carrier for hire other than an armored motor vehicle company for the purpose of transportation" (J.A. 145).

The trial judge, sitting without a jury, found that Guren, Sade's employee, though possibly careless, was not involved personally in Sekular's scheme to defraud (J.A. 132). Appellants do not agree that this conclusion of the trial court was correct but, faced with "clearly erroneous" test of Rule 52(a), F.R. Civ. P., appellants have no alternative but to concede that the trial court's conclusions are supportable. United States v. Yellow Cab Company, 338 U.S. 338, 342 (1949). Appellants, therefore, for the purpose of this appeal will not rely on Clause (A).

Clause (B), on the other hand, presents, for all practical purposes, a question of law relating to coverage under the policy. The evidence is not really in conflict and, under it, the appellants submit that coverage was shown.

For these purposes, we can accept the facts found by the trial judge:

"Sometime early in August, 1959, S. Thomas Guren, a registered securities representative and employee of Sade & Co., engaged in discussions with Stanley Sekular, a friend of long standing, relative to the purchase by

Sekular through Guren and Sade & Co. of certain securities. Sekular ultimately determined to purchase a substantial amount of stock in Television Shares Management Company, a large mutual fund management organization controlling assets in the neighborhood of four hundred million dollars. . . . On the day that Television Shares Management Company's stock was first traded, August 10, 1959, Guren received an open order from Sekular for the purchase of up to $100,000 of said stock. At that time, Guren informed Sekular that he could not accept such an order unless he had a check in his hands. Sekular thereupon came to the Sade & Co. office and gave Guren a check, blank except for Sekular's signature as maker and the word "August" with no specified date thereafter. Sekular instructed Guren that the check was to be completed and delivered only upon receipt by Sekular of confirmation by Sade & Co. to Sekular of the consummation of the transaction.

. . . Some ten days before the date of issue, Sekular informed Guren that $100,000 was to be deposited in Sekular's checking account for this purpose. Guren was further informed that the money was being supplied by certain executives in Philadelphia. On August 9th, Guren again asked Sekular how he intended to pay for the stock; Sekular replied, 'The money is as good as in the bank.' On the day of the purchase, Sekular told Guren, 'The money is in the bank. Go ahead and buy it.' Leo Sade, a partner in the plaintiff firm, admitted at the trial that he was aware of the receipt of this order prior to its execution.

On August 10th, Sade & Co. placed two orders for Television Shares Management stock for the Sekular account through the New York brokerage house, Gregory & Sons. 1,300 shares were purchased at 26-1/2 and 1,000 shares at 26-1/4. The total cost of this stock to Mr. Sekular, including commissions, was $61,440.55. Confirmation of the purchase was mailed to Sekular on that date. Due to illness, Guren was unable to come to his office on the settlement date, August 14th, or the next two business days, August 17th and 18th. After having received a phone call from Miss Mahon, the office manager of Sade & Co., on August 19th, the seventh business day after purchase, Guren did come to the Sade & Co. office to turn in the Sekular check. The check was then completed as to amount and date and deposited for collection. On August 21st, Miss Mahon received a call from Sekular's bank informing her that there was not enough funds to clear

the check. Guren was not aware of this until Monday, the 24th, for the reason that he had spent the week end with his family out of town. Upon receiving this information, Guren contacted Sekular who stated that there was some sort of "mix-up" and that the check should be redeposited. This was never done, as Sade & Co. then called Sekular's bank and learned that Sekular had only a $200 balance in his account. On August 25th, Sekular's "NSF" check was returned to Sade & Co.

A series of phone calls, conversations, meetings and accusations then ensued between Sade & Co., Sekular, Guren, and members of the families of the two individuals. On August 26th, Sade & Co. received $1,900 in cash from Sekular. On that same date a telegram was sent to Sekular reserving the right to sell out his account in full after 3:00 P.M. August 28th, 'or as soon thereafter as practicable predicated upon prevailing market conditions.' No further payments were forthcoming and sale of the stock was eventually effected in three separate transactions on September 1st and 3rd, and December 24, 1959. Due to a rapidly falling market in this stock, not only was it difficult to locate purchasers, but it was also necessary to incur substantial losses when the sales were finally effected. The total loss to plaintiffs was $18,476.69.

. . . it is necessary to examine the evidence as to any 'dishonest, fraudulent or criminal acts' by Sekular and/or Guren. Sekular did not testify at the trial of this cause of action. However, the evidence offered by others who did testify clearly established Sekular's fraud and bad faith with regard to this transaction. Sekular caused Guren to believe that he was possessed of a substantial amount of money and that a check Sekular presented to Guren would be cleared up to the sum of $100,000, when presented for payment On the day that the purchase in question was effected, Sekular unequivocally stated to Guren that the money was in the bank and the stock should be purchased. In truth, Sekular had no more than $200 in his account; the disparity between that figure and the one he stated to Guren cannot be explained away as a mistake. There is no doubt that Sekular was engaging in a fraudulent and dishonest scheme in an attempt to reap a windfall profit" (J.A. 128-132).

The court concluded that these facts did not bring Sade & Co. within the coverage of Clause (B) of the bond, the clause frequently referred to as relating to "on premises" loss. Appellants submit that the District Court erred.

Clause (B) reads:

> "Any loss of Property through robbery, burglary, common-law or statutory larceny, theft, hold-up, or other fraudulent means, misplacement, mysterious unexplainable disappearance, damage or destruction, abstraction or removal from the possession, custody or control of the Insured (whether effected with or without violence or with or without negligence on the part of any Employee), and any loss of subscription, conversion, redemption or deposit privileges through the misplacement or loss of Property, while the Property is (or is supposed to be) lodged or deposited within any offices or premises located anywhere, except while in the mail or in any of the Insured's offices specifically excluded from the coverage of this bond or with a carrier for hire other than an armored motor vehicle company for the purpose of transportation" (J.A. 145).

Thus, it is apparent that certain elements are required -- a loss of property[2]; as a result of some defined illicit activity; from the premises of the insured. Appellants submit that these elements are present.

---

[2] Property is given the broadest definition:

> "Wherever used in this bond Property shall be deemed to mean money, currency, coin, bank notes, Federal Reserve notes, postage and revenue stamps, U. S. Savings Stamps, bullion, precious metals of all kinds and in any form and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semi-precious stones, bonds, securities, evidences of debts, debentures, scrip, certificates, interim receipts, warrants, rights, puts, calls, straddles, spreads, transfers, coupons, drafts, bills of exchange, acceptances, notes, checks, money orders, warehouse receipts, bills of lading, withdrawal orders, conditional sales contracts, abstracts of title, insurance policies, deeds, mortgages upon real estate and/or upon chattels and upon interests therein, and assignments of such policies, mortgages and instruments, and other valuable papers and documents, and all other instruments similar to or in the nature of the foregoing, in which the Insured has an interest or which are held by the Insured for any purpose or in any capacity and whether so held gratuitously or not and whether or not the Insured is liable therefor."

What activity took place? The policy requires loss through "robbery, burglary, common-law or statutory larceny, theft, hold-up, or other fraudulent means" (J.A. 145). The court found that Sekular's conduct was fraudulent (J.A. 132); more than that, the conduct was clearly violative of D.C. Code §22-1410, the worthless check statute, and of D.C. Code §22-2201, larceny. Such conduct was held covered by an almost identical bond provision in National Bank of Paulding v. Fidelity & Casualty Co., 131 F. Supp. 121, 123, 124 (W.D. Ohio 1954). Also instructive is Federal Deposit Ins. Corp. v. Hartford Acc. & Ind. Co., 106 F. Supp. 602 (E.D. Mo. 1952), aff'd 204 F.2d 933 (8th Cir. 1953), a check-kiting scheme wherein the court, holding the surety liable, observed, in language remarkably apropos for this case:

> "It is a part of false pretense to lull the victim into a feeling of security in order to perpetrate the fraud. So here we find Schneier taking advantage of his personal acquaintance with the bank officer and her belief in his integrity. . ."

For other facets of the same case see Bank of Altenburg v. Fidelity & Casualty Co., 118 F. Supp. 529 (E.D. Mo. 1953), aff'd 216 F2d 294 (8th Cir. 1954). These cases make it clear that the type of conduct found by the court to have been engaged in by Sekular could lead to coverage under the bond. Each of the cases, likewise, supports the proposition that the term property includes assets of Sade & Co. which were lost by Sekular's speculations and that the loss is an "on premises" loss within the meaning of indistinguishable bond provisions. See also Paddleford v. Fidelity & Casualty Co. of N.Y., 100 F.2d 606 (7th Cir. 1938). The trial court concluded that, notwithstanding the cases hereinbore cited, that there is a difference between a bankers bond and a brokers bond and that the term property must be limited only to tangibles (J.A. 134). Appellants submit the court was in error. Credit of the defrauded institution is property. National Bank of Paulding v. Fidelity & Casualty Co., supra, at 124. Nor should it make any difference that Sekular never actually withdrew funds from Sade & Co. (see J.A. 134); Sade was forced by his fraudulent conduct to expend funds --

the money paid by Sade for the shares for Sekular's account -- funds a part of which he subsequently lost.

Appellant submits that a reading of the bond against the facts found by the court indicates that the District Court erred in finding Clause (B) inapplicable. Particularly is this so when consideration is given to the breadth of the term "blanket bond", Fidelity Trust Co. v. American Surety Co. of N.Y., 268 F.2d 805, 807 (3rd Cir. 1959), and the policy of construing insurance contracts in favor of the insured. Paddleford v. Fidelity & Casualty Co. of N.Y., 100 F.2d 609 (7th Cir. 1938).

II

THE "TRADING LOSS" EXCLUSION IS OF NO AID TO APPELLEES

Appellee sought to avoid coverage under Clause (B) of the bond by invoking an exclusionary provision in the bond and the court below agreed with them:

> "Even assuming arguendo that the claimed loss were ostensibly included under Clause (B) of the bond, plaintiff would still not be entitled to indemnification, for the loss they sustained is one specifically excluded from coverage under the policy" (J.A. 135).

The policy provision in question reads:

> "(g) Any loss resulting directly or indirectly from trading, with or without the knowledge of the Insured, in the name of the Insured or otherwise, whether or not represented by any indebtedness or balance shown to be due the Insured on any customer's account, actual or fictitious, except when covered under Insuring Clause (A), (D), or (E).

For the reasons herein set forth, that provision is of no assistance to National Surety.

A. The Exclusion Was Not Pleaded

It is axiomatic that the failure of an insurer to plead an exclusionary clause in the policy constitutes a waiver of the right to rely on that defense, Lopez v. United States Fidelity & Guarantee Co., 18 F.R.D.

59 (D. Ala. 1955); Community Fed. Sav. & L. Ass'n. v. General Casualty Co., 274 F.2d 620, 624 (8th Cir. 1960), and nowhere in the answer was such a plea made.

The appellant's answer was, in effect, a general denial (J.A. 4) and such affirmative defenses as were pleaded contained no inkling of reliance on the exclusion. After the first hearing in December of 1961, when the defendant filed a motion for leave to file a supplemental answer raising this exclusion, the court granted leave over the plaintiffs' objection (J.A. 105-6). The Court's memorandum, on allowing the amendment, sets forth the court's reasoning:

> "2. Plaintiffs' complaint, alleging fraud and collusion by Guern and Sekular, states a cause of action under coverage "A" of the broker's bond. The pretrial order signed by plaintiffs' counsel reaffirms this position. After completion of pretrial, plaintiffs first requested an amendment of the pretrial order so as to include a claim under coverage "B" on the theory of fraud perpetrated upon Sade & Co. by Sekular alone. This was allowed over the objection of defendant's counsel. At this juncture it may have been wiser for defendant to further amplify its position by amendment of their previously asserted defenses. This they did not do. However, the Court reads defendant's second defense as raising the issue of a "trading loss" exclusion" (J.A. 108).

The second defense adverted to, labelled Third Defense, reads:

> "Defendant avers that any loss or damage sustained by plaintiffs herein resulted from the wrongful acts of a person other than an employee of plaintiffs; and not acting in collusion with any employee of plaintiffs, and is therefore not covered by defendant's bond" (J.A. 4).

Appellants submit that the Court below was in error in allowing the amendment, that the exclusion was not properly pleaded by way of answer and that the exclusion must be deemed waived.

B. The Exclusion Was not a Part of Pre-Trial Proceedings

Another, and equally serious, obstacle to consideration of National Surety's exclusion defense is that it was nowhere raised during the

course of the pretrial proceedings. The Defendants' Pretrial Statement (J.A. 7) does not raise it in the "Legal Grounds of Defense" (J.A. 8) which sets forth five defenses, none of which raise the exclusion. The pretrial order does not raise it (J.A. 14). Under these circumstances, it should not have been entertained.

This Court has been rightly critical of parties who attempt to rely upon defenses not raised during pretrial. In Meadow Gold Products Co. v. Wright, 108 U.S. App. D.C. 33, 278 F.2d 867 (1960), the Court observed:

> "The casual pleading indulged by the courts under the Federal Rules of Civil Procedure has quite naturally led to more and more emphasis on pretrial hearings and statements to define the issues. To give full effect to the modernized rules, one of the theories of a case is not to remain a mystery or a matter of speculation and conjecture. It was to get away from legal sparring and fencing, and from surprise moves of litigants, that the new rules were adopted. Cf. Walker v. West Coast Fast Freight, Inc., 9 Cir., 1956, 233 F.2d 939. The refinement of these basic objectives is manifested in the increasing emphasis on the pre-trial processes.
>
> To this end, Rule 16, Fed. R.Civ. P., 28 U.S.C.A., provides that the court, in its discretion, may direct the parties to attend a pretrial conference to consider, inter alia, the necessity and desirability of simplifying the issues or amending the pleadings. The action taken at this conference is recited in a court order "and such order when entered controls the subsequent course of the action * * *." In this jurisdiction, a full-time Pre-Trial Commissioner, an Assistant Pre-Trial Commissioner, and a staff have been set up.
>
> [4] In view of all these developments, the courts are not to be lenient with counsel who fail to reveal the theory of their case until all the evidence is closed."

This expression was approved and reaffirmed in Conlon v. Tennant, 110 U.S. App. D.C. 140, 289 F.2d 881 (1961), footnote 3, and in Johnson v. Giffen, -- U.S. App. D.C. --, 294 F.2d 197 (1960). See also Blanken v. Bechtel Properties, Inc., 194 F. Supp. 638, 642 (D.D.C. 1961):

> "It must be borne in mind that one of the principal purposes of pre-trial is to crystallize and formulate

> the issues to be tried and to present a complete statement of all the contentions of the parties as to the law and fact. Any contention not presented at pre-trial may not be raised at trial."

And McCarthy v. Lerner Stores Corporation, 9 F.R.D. 31 (D.D.C. 1949):

> "One of the chief purposes of pretrial procedure, and the principal usefulness of a pretrial order, is to formulate the issues to be litigated at the trial. The parties are bound by the pretrial order. They may not later inject an issue not raised at the pretrial conference. Otherwise the primary objective of pretrial procedure would be defeated. It is assumed by the Court that at the pretrial counsel are as thoroughly familiar with the case--making as complete a disclosure as they would at the trial, and being as completely prepared--as they will be at the trial. This is an unavoidable and inexorable duty that the existing Federal practice imposes on members of the bar. To say that parties are not bound by the pretrial order is a misunderstanding of the purpose and the office of pretrial."

Other circuits have been equally, or more, stern in enforcing these pre-trial rules. National Union Fire Insurance Co. v. Santos, 303 F.2d 309 (9th Cir. 1962); Miller v. Brazil, 300 F.2d 283 (10th Cir. 1962); Walker v. West Coast Fast Freight, Inc., 233 F.2d 939 (9th Cir. 1956); Bernard v. U.S. Aircoach, 117 F. Supp. 134, 137 (S.D. Cal. 1953). Perhaps the most recent expression is found in Payne v. S.S. Nabob, 302 F.2d 803 (3rd Cir. 1962), wherein the Court, sustaining the refusal of the trial court to permit an amendment of the pleading, stated:

> "It is argued also that the court abused its discretion by refusing to permit amendment of the pretrial memorandum. This was not an easy decision for the trial judge. His inclination clearly, as is habitual with judges, was to help. And help he would have if, in his opinion, he could have done so fairly. But he was confronted with the realization that if he granted the request or allowed a continuance of the trial he was repudiating the whole pretrial theory and system as understood and followed in the Eastern District at a crucial period of its existence. Pretrial was finally on a firm foundation there. The judges had all given it generous and complete attention. This, with the gradual realization of the bar that pretrial was here to stay as a vital element of litigation practice and its resultant full cooperation, had made pretrial procedure routine in the Eastern District.

> One consequence was that directly and indirectly enormous relief was given the badly clogged trial list. It was admittedly vitally important to make sure that pretrial procedure would continue to function properly. One necessary phase of attaining that objective was, as expressed by the trial judge, 'We have come to the point of enforcing it very strictly.' In the circumstances he considered himself obliged to deny the motions to amend the pretrial memorandum with respect to liability allegations and witnesses. The refusal of appellant's motion for a continuance is in the same category.
>
> Beyond all doubt the judge acted entirely within his discretion. It was difficult for him, it took courage but it was what this sound, experienced judge had to do as he saw it, in accordance with his judicial obligation."

Such a statement is equally applicable in this circuit and to this case.

Appellants submit, therefore, that the exclusionary defense was improperly raised, that the amended pleading was improper and that the defendant should have been precluded from relying on such a defense.

Appellants submit, moreover, that the "trading loss" exclusion, not having been pleaded in the answer or raised at pre-trial, has no part in this case. But, even assuming it properly to be in the case, appellants submit that the exclusion is of no avail to the appellee.

C. The Exclusion Does Not Assist the Appellee

During the course of the supplemental hearing ordered by the District Court, unanimous and uncontradicted testimony was given by knowledgable persons that the provision in question did not exclude coverage under the facts found by the court. Joseph Dyer Riviera, a broker-dealer registered with the Securities and Exchange Commission and President of Riviera, Marsh & Company (J.A. 119), gave his interpretation of the policy provisions -- that it only referred to a trading loss by a broker when dealing for his own account (J.A. 120):

"By Mr. Derrickson:

"Q. In other words Mr. Riviera, trading loss to a broker, if another broker told you he had a trading loss, you would know it would be for his own account? A. That is correct, that is the only way a broker can have a trading loss, when he is acting for his own account and risk as a dealer or principal" (J.A. 120).

* * * * *

"Q. Is it your testimony that a trading loss can only come about to a dealer in his own account? A. That is correct" (J.A. 125).

This conclusion was corroborated by William G. Russell, for twenty years an insurance broker and consultant in the Washington area (J.A. 125) and the agent for the appellee who sold the bond in question to Sade & Co. (T. 255). His testimony is clear and unequivocal:

"THE COURT: I understood you to say, Mr. Russell, that you understood this bond covered a transaction where a customer would come in with a check, -- let's make it specifically as it was in this case -- a blank check with authority to buy up to $100,000 of a new issue of stock that could be bought over the counter, and that if that check bounced because of no funds, that this bond would cover it; is that your opinion?

THE WITNESS: If there was fraud involved, Your Honor --

THE COURT: No, no, let's not have any ifs. The customer issues it in blank, with no funds in the bank to cover it, and it is presumptively fraud under the statute for anyone to issue a check without funds in the bank, so that is the presumptive fraud, and he issues a check with authority to fill in the amount up to $100,000 and for the purchase of a new issue of stock for $61,000 was actually purchased. Would you say this bond covers that?

THE WITNESS: In my opinion, Your Honor, it would. Fraud on the premises" (J.A. 126).

And Leo Sade, himself, supported these conclusions by explaining the difference between "trading" for one's own account and buying and selling for customers (J.A. 111). The difference is significant.

These expert and informed opinions are important for not only must ambiguities in policies of insurance be construed against the

insurer, but they must be construed in accordance with business and insurance usage. Standard Oil Co. of N.J. v. United States, 340 U.S. 54, 60 (1950). Appellant submits that the trial court was clearly erroneous in finding that the exclusion affected policy coverage under the facts found. In full support of this proposition is Paddleford v. Fidelity & Casualty Co. of New York, 100 F.2d 606, 613 (7th Cir. 1938), wherein the court, faced with an indistinguishable policy with a virtually identical exclusion, stated:

> "To us it borders on the preposterous to say that it was the intention of the parties to indemnify plaintiffs against the loss . . . and at the same time make this indemnity unavailing if the loss was occasioned while engaged in trading, the precise business in which plaintiffs were engaged as defendants well knew. It is not consistent with our sense of justice to say that either of the parties intended that the plaintiffs in one breath should be given protection, and in the next, taken away. It would be just as logical to insure an employer against liability incurred because of an injury of an employee and then limit the protection so that it would not apply in case the employee was behind the cashier's window.
>
> ". . . Notwithstanding defendants' contention that the language of the limitation clause is plain and unambiguous, one District Court held the provision did not constitute a defense, and a reading of the cases heretofore referred to indicates that it has been the occasion for doubt and confusion. We think there is sufficient doubt as to its meaning to bring into force the rule so often announced, that a construction should be had, if possible, which will effectuate the insurance and not defeat it."

Appellants submit, therefore, that the "trading loss" exclusion, even if properly in the case, does not operate to defeat coverage and that the trial court erred when it found to the contrary.

III

THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL

Following the filing by the trial court of a memorandum opinion, the appellants moved, within the time permitted by Rule 59(b), F.R. Civ. P., for a new trial on the grounds (the only one here pertinent) that "although Plaintiffs diligently attempted to produce Stanley Sekular and Ann Lewis (Sekular) as witnesses, they were unable to be found . . . It is now established that one of these witnesses, at least, has returned to the jurisdiction . . ." (J.A. 138). This was later supplemented:

> "Plaintiffs dilligently attempted to take depositions of the witnesses Sekular, man and wife but were unable to do so because their counsel refused to allow them to, on the ground of marital privilege. Before and at trial, both of these persons could not be found; after diligent search it was reported that at least one witness was out of the country. It has now been ascertained that these parties are divorced and it is plaintiffs belief that the testimony of the divorced wife will be admissable and have material bearing upon the issues in litigation" (J.A. 139).

The trial court denied the motion (J.A. 141). Such a ruling was error.

The importance of Mrs. Sekular's testimony is clear. In describing Sade's contentions with respect to Clause (A) of the policy (employee dishonesty), the court observed:

> "Plaintiffs assert that in August, 1959, their employee Guren entered into a scheme with Sekular for the purchase of up to $100,000 worth of Television Shares Management stock when issued; that neither could pay for that amount of stock, but they hoped that after purchase, the price of the stock would rise so that it could immediately be resold at a profit; that the plan was for Guren to hold the check given him in payment for the stock by Sekular for a sufficiently long period of time so that resale could be effected and the proceeds of the sale deposited to cover the check.
>
> "If Plaintiffs' theory were substantiated by the proof offered at trial, there is no doubt that they would be entitled to indemnification under the provisions of Clause (A) of the bond" (J.A. 131).

The court concluded that the plaintiffs had not made a case -- at least under the strict proof requirements when fraud is involved. But the likelihood is that Mrs. Sekular could have cured this defect, for the record reveals that she had given a statement which implicated Guren in the fraudulent scheme. Leo Sade testified that he met with Mrs. Sekular on or about August 21, 1959, in the presence of representatives of the appellee and that she there stated that Guren was involved in the fraud:

> "BY MR. DERRICKSON:
>
> Q. Did she state S. Thomas Guren was involved in this purchase with Mr. Sekular? A. Correct.
>
> Q. Did she state the profits would be split between them? A. Correct.
>
> MR. RYAN: I object to this as leading, if nothing else, Your Honor."

The objection was sustained but it is clear what knowledge Mrs. Sekular had which would implicate Guren and establish coverage under Clause (A) of the policy.

Under these circumstances, why was Mrs. Sekular not called as a witness to implicate Guren? Regardless of what Mrs. Sekular's availability was, the real reason lies in D.C. Code §14-306:

> "In both civil and criminal proceedings, husband and wife shall be competent but not compellable to testify for or against each other."

Mrs. Sekular could not have implicated Guren without equally implicating her husband and this she could not have been compelled to do (see J.A. 139). Upon divorce, she could have been compelled to testify and, from all indications, fill the gaps in Sade's case insofar as Clause (A) was concerned. See Andrist v. Union Pac. Ry. Co., 30 Fed. 345, 349 (D. Colo. 1887).

CONCLUSION

For the foregoing reasons, the appellants respectfully submit that the judgment appealed from should be reversed and judgment ordered entered for the Sade & Co. or, in the alternative, that the cause be remanded for a new trial.

CHARLES P. MULDOON

RAYMOND W. BERGAN
1000 Hill Building
Washington 6, D.C.
Counsel for Appellants

Of Counsel:
WILLIAMS & STEIN
1000 Hill Building
Washington 6, D. C.

INDEX

	Page
Complaint on Bond, Filed March 1, 1960	1
Answer of Defendant, Filed March 23, 1960	4
Interrogatories to Plaintiffs, Filed January 16, 1961	5
Plaintiffs' Amended Answers to Interrogatories, Filed February 25, 1961	6
Defendant's Pretrial Statement, Received September 12, 1961	7
Pretrial Proceedings, Filed October 9, 1961	9
Excerpts from Transcript of Proceedings, December 1, 1961	16

Witnesses:	Tr. Page	
Leo Sade		
Direct	50	16
Cross	117	41
Redirect	157	59
Abraham Sekuler		
Direct	161	60
John H. Sutton		
Direct	165	60
Cross	169	62
Frances Mahon		
Direct	178	63
Cross	183	66
Redirect	191	69
Arthur C. Bailey		
Direct	193	70
Cross	200	73
December 4, 1961		
S. Thomas Guren		
Direct	4	74
Cross	34	87
Redirect	83	102

Motion for Leave to File a Supplemental Answer of Defendant, Filed January 30, 1962	104
Order Granting Leave to File Supplemental Answer, Filed January 30, 1962	105
Supplemental Answer of Defendant, Filed February 2, 1962	105
Plaintiffs' Opposition to Defendant's Motion for Leave to File a Supplemental Answer, Filed February 7, 1962	106
Memorandum and Order, Filed February 20, 1962	107

	Tr. Page	J.A. Page
Excerpts from Transcript of Proceedings: March 7, 1962:		
Witnesses:		
Leo Sade		
Direct	204	109
Cross	236	117
Joseph Dyer Riviera		
Direct	238	118
Cross	249	122
Redirect	253	125
William G. Russell		
Direct	253	125
Memorandum Opinion, Filed April 17, 1962		127
Final Judgment Dismissing Plaintiffs' Complaint Upon the Merits, Filed May 1, 1962		137
Plaintiffs' Motion for New Trial, Filed May 10, 1962		138
Affidavit of Counsel in Support of Motion for New Trial, Filed May 10, 1962		138
Plaintiffs' Supplemental Motion for New Trial, Filed May 16, 1962		139
Opposition to Plaintiffs' Motion for New Trial, Filed May 16, 1962		140
Memorandum and Order, Filed May 23, 1962		141
Notice of Appeal, Filed June 22, 1962		143
Plaintiff's Exhibit 34 -- Brokers Blanket Bond - Standard Form No. 14 -- National Surety Corporation		144

JOINT APPENDIX

[Filed March 1, 1960]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEO SADE
HUGH D. HITE
FRANCES MAHON
HAROLD M. WALTERS
MYRON S. HEFFTER
t/a SADE & CO.
A Partnership
1511 K Street, N.W.
Washington, D. C.

Plaintiffs

vs

Civil Action No. 616-60

NATIONAL SURETY CORPORATION
A Corporation
Woodward Building
Washington, D. C.

Defendant

COMPLAINT ON BOND

Plaintiffs upon information and belief allege as follows:

1. This Court has jurisdiction as the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000).

2. Leo Sade, Hugh D. Hite, Frances Mahon, Harold M. Walters and Myron S. Heffter are partners t/a Sade & Co., a partnership, doing business in the District of Columbia as stockbrokers, and are hereinafter referred to as plaintiffs.

The national Surety Corporation is an insurance corporation, incorporated under the laws of the State of New York and maintains its

principal office in New York City. It conducts business in the District of Columbia as a registered foreign corporation and is hereinafter referred to as the defendant.

3. On or about April 1, 1959, the defendant duly executed and delivered to the plaintiff its "Brokers Blanket Bond, Standard Form No. 14, No. 2093385 (hereinafter referred to as the bond) under seal and thereby bound itself, in the sum of $30,000 to plaintiff, to reimburse plaintiff for any pecuniary or other loss sustained by plaintiff through any dishonest, fraudulent or criminal act of any of plaintiff's employees, committed anywhere and whether committed alone or in collusion with others.

4. The defendant duly executed and delivered the said bond to the plaintiff in consideration for the payment of the total premium of $1437.34. Payments of installments of this sum have been duly received by the defendant. Said bond was to remain in full force for the term of three years from April 1, 1959. The plaintiff is the sole owner and holder of the said bond and is entitled to recover all sums due or to become due thereupon.

5. On or about July 28, 1958, one Thomas Guren entered into the employ of the plaintiff in the capacity of a security salesman and continued to remain in the employ of plaintiff until September 25, 1959, when he was discharged for misconduct.

6. Plaintiffs allege that while the aforesaid bond was in full force and effect the said Thomas Guren, unknown to plaintiffs, acted dishonestly, fraudulently and criminally in that he conspired with one Stanley Sekular in a scheme to purchase securities and then to resell them after a rise in price at a profit, to the mutual benefit of both, all without the funds necessary to purchase the securities. It is further alleged that during the perpetration of this scheme the said Guren delivered to plaintiffs a check drawn on the Suburban Trust Company, Hyattsville, Maryland, in the amount of $61,440.25, which check was made by the said Sekular, both the said Guren and the said Sekular knowing full well at the time of delivery of the check that the said Sekular did not have

sufficient funds on deposit in the Surburban Trust Company to cover the check and only had on deposit a nominal amount. The said check was delivered to the plaintiffs by the said Guren as payment for 2,300 shares of Television Shares Management stock previously purchased on August 10, 1959, by plaintiffs pursuant to an order placed by Guren for the account of Sekular, after plaintiffs were given assurances by Guren that Sekular was responsible, could meet the obligation and that a check in full payment would be forthcoming. After the check was returned from the Surburban Trust Company for insufficient funds, repeated demands for payment in full were made upon the said Sekular, as well as upon the said Guren after his complicity in the scheme was ascertained; however, satisfaction has not been obtained. As a result, plaintiffs were forced to pay for the stock aforementioned and as a result of a decline in the market price, upon resale, have incurred a loss in the amount of $18,476.69, plus interest based upon the purchase price for the period during which plaintiffs held the securities, in the approximate amount of $3,379,20, making a total loss of $21,855.89.

7. The plaintiff has duly performed all of the terms and conditions of the said bond on its part, and has notified the defendant in writing of the loss and has duly made demand upon the defendant for the reimbursement to plaintiff of the loss. No part of that amount has been paid to plaintiff and the defendant neglects and refuses to pay same.

8. By reason of the foregoing, defendant is indebted to plaintiffs in the sum of $21,855.89.

WHEREFORE, plaintiffs pray for judgment against the defendant in the sum of $21,855.89, together with interest; for cost of suit; for such further sum as the Court may deem reasonable for attorney's fees for services in this action; and for such other and further relief as the Court may deem proper.

/s/ Lloyd J. Derrickson
Attorney for Plaintiffs

* * *

[Filed March 23, 1960]

ANSWER OF DEFENDANT

FIRST DEFENSE:

Plaintiffs' complaint fails to state a cause of action upon which any relief may be granted.

SECOND DEFENSE:

Defendant admits jurisdiction of this Court, admits plaintiffs' partnership status and business.

Defendant further admits its corporate status, qualification in the District of Columbia, and that it heretofore issued the bond to plaintiffs referred to in plaintiffs' complaint, and that the same was in effect on the dates alleged with current premiums duly paid.

Defendant has no knowledge of the circumstances of the hiring or of the discharge of the said Thomas Guren referred to in plaintiffs' complaint, and accordingly, if material, demands strict proof of the same.

Defendant denies each and every allegation of plaintiffs' complaint asserting that the said Thomas Guren acted dishonestly, fraudulently and criminally, and denies that plaintiffs performed all of the terms and conditions of the bond required on plaintiffs' part.

Defendant denies that plaintiffs were damaged as alleged, and further avers that plaintiffs failed to minimize the damages allegedly sustained by them by failing to sell the securities involved herein on a more favorable market or markets.

THIRD DEFENSE:

Defendant avers that any loss or damage sustained by plaintiffs herein resulted from the wrongful acts of a person other than an employee of plaintiffs', and not acting in collusion with any employee of plaintiffs, and is therefore not covered by defendant's bond.

FOURTH DEFENSE:

Defendant avers that any loss or damage sustained by plaintiffs herein resulted from plaintiffs' negligent, careless and reckless operation and conduct of their business in failing to supervise, manage and

control their accounts, and in failing to enforce the terms and conditions of their security contracts, as well as in failing to enforce their customers' compliance with law and custom.

WHITEFORD, HART, CARMODY & WILSON

/s/ Harry L. Ryan, Jr.,
815 - 15th St., N.W.
Washington 5, D.C.
Attorneys for Defendant

Certificate of Service: Dated March 22, 1960.

[Filed January 16, 1961]

INTERROGATORIES TO PLAINTIFFS

* * * * *

17. On what dates were offers made in the market for shares of the stock involved herein between the date when you were first aware of the purchaser's default and your final sale, and what was the bid price on said dates?

(a) What sales at what prices were made on each such dates?

* * * * *

27. How was this transaction accounted for in your income tax returns?

* * * * *

30. Has any loss been heretofore allocated in any amount to any of your partners?

(a) If so, to which and to what extent?

* * * * *

WHITEFORD, HART, CARMODY & WILSON

/s/ HARRY L. RYAN, JR.
Attorney for Defendant

Certificate of Service: Dated January 16th, 1961.

[Filed February 25, 1961]

PLAINTIFFS' AMENDED ANSWERS TO INTERROGATORIES

LEO SADE, being duly sworn answers Defendant's interrogatories upon information and belief as follows:

* * * * *

17. Plaintiffs believe that offers were made on all dates subsequent to the purchaser's default and prior to Plaintiffs' final sale. The bid prices on these dates varied. Defendant's request may be partially answered by reference to the quotations for the stock contained in the Eastern Section of the National Daily Quotation Service, New York, New York, during the period in question. Plaintiffs do not presently have copies of these quotations, which are equally available to Defendant.

(a) Plaintiffs refer to the prices contained in item 16, above, as the market prices for the securities at the time of their sale.

* * * * *

27. The transaction was accounted for as a loss on the partnership return for the year 1959.

* * * * *

30. The loss has been allocated to the partners in accordance with their partnership interests.

* * * * *

/s/ Leo Sade,
Partner for Plaintiffs

Subscribed and sworn to before me, a Notary Public in the District of Columbia this 24th day of February, 1961.

/s/ Clyde Saul
Notary Public

Certificate of Service: Dated February, 24th, 1961.

[Received September 12, 1961]

DEFENDANT'S PRETRIAL STATEMENT

Facts:

Defendant states that at the time this action was instituted the named plaintiffs constituted a partnership as alleged. The record discloses, however, changes in the partnership which raises the question of adding or dropping parties plaintiff.

Defendant states further that it is an insurance corporation, duly registered and doing business locally, and that on August 10, 1959, it had in effect a "Brokers Blanket Bond" indemnifying "Sade & Co." against certain losses set forth and described therein.

Defendant further states that on and prior to August 10, 1959, one Thomas Guren was an employee of Sade & Company, engaged as a security salesman and as such having authority from plaintiff as his employer to handle directly all negotiations with customers for the purchase and sale of securities. Pursuant to his employment, Thomas Guren negotiated an order from one Stanley Sekular for purchase by the said Sekular of 2,300 shares of stock of Television Shares Management, having a then market value of $61,440.25, and for which order Thomas Guren accepted a check from Sekular signed in blank, and that upon determination of the foregoing market price he completed said check and turned the same over to his employer. Upon deposit of the aforesaid check by plaintiffs it was returned to them dishonored for lack of sufficient funds.

Plaintiffs thereafter made demands upon Sekular to provide plaintiffs with the necessary funds to meet the obligations of his purchase order, which demands defendant is advised were at no time met.

Subsequently, plaintiffs disposed of these shares and have brought this action for their claimed net loss.

The policy upon which this action is brought provides as follows:

(A) Any loss through any dishonest, fraudulent or criminal act of any of the Employees, committed anywhere and whether com-

mitted alone or in collusion with others, including loss of Property through any such act of any of the employees."

Legal Grounds of Defense:

1. The loss claimed herein did not result from any dishonest, fraudulent or criminal act of plaintiffs' employee committed either alone or in collusion with another.

2. Any loss sustained by plaintiffs resulted from the acts of a person other than plaintiffs' employee, and between which person and plaintiffs' employee, no collusion existed.

3. Any loss sustained by plaintiff resulted and was caused solely by their manner and method of operations, and such actions as they took unto themselves in the handling of this matter, in a manner contrary to pertaining rules and regulations of the stock brokerage business.

4. The steps taken by plaintiffs upon their ascertainment of the transaction constituted either their condonation or at least their acquiescence to the transaction, as well as a waiver of any rights under the policy herein.

5. If defendant is liable herein, then and in that event plaintiffs failed to mitigate their damages by converting and retaining the securities involved to their own ownership and account; by failing to sell the same at the purchaser's risk as obliged by regulation, and by failing to offer the same for sale, or to sell them timely.

Stipulations:

Defendant will agree to the following stipulations:

1. All books, writings in the possession of, documents, and records of plaintiffs may be admitted in evidence without formal proof, subject to materiality and relevance.

2. All pertinent Treasury Regulations may be introduced into evidence without formal proof, subject to materiality and relevance.

3. Transcription of Daily Quotation Sheet of the National Quotation Bureau relating to Television Shares Management Company stock from August 10, 1959, through December 31, 1959, may be introduced in evidence.

4. Plaintiffs' 1959 Partnership Information Return filed with the Internal Revenue will be produced and available at the time of trial.

5. All records of the United States Attorney for the District of Columbia relating to complaints made by the plaintiffs concerning this transaction may be admitted in evidence without formal proof, subject to materiality and relevance.

WHITEFORD, HART, CARMODY & WILSON

/s/ Harry L. Ryan, Jr.
Attorneys for Defendant.

[Filed October 9, 1961]

PRETRIAL PROCEEDINGS

Statement of Nature of Case:

Action for money due under Brokers' Blanket Bond.

UNDISPUTED FACTS:

Individual Ps are partners t/a Sade & Co., a partnership, doing business in the District of Columbia as stock brokers.

D, National Surety Corporation, is a New York insurance corproation, duly registered and doing business in the District of Columbia.

D executed and delivered to Ps a "Brokers' Blanket Bond, Standard Form No. 14," No. 209 3385, effective for three years from April 1, 1959.

One Thomas Guren was a securities salesman in the employ of Ps Sade & Co. during the period here involved.

Said Guren, on August 10 and 11, 1959, placed orders for the account of one Stanley Sekular for a total of 2300 shares of stock of Television Shares Management Company, having a then market value of $61,440.25. Said Guren accepted a check from Sekular dated "August --, 1959", signed in blank, and upon determination of the foregoing market price Guren completed said check and turned it over to his employers, Ps. Upon deposit of said check by Ps it was returned

to them dishonored for lack of sufficient funds.

After dishonor of the check, Ps made repeated demands for payment in full upon Sekular, and received from him $1900. No further payment was made by Sekular.

Partial recovery was effected by Ps by the sale of 400 shares of the stock on Sept. 1, 1959 and 200 additional shares on Sept. 3, 1959, resulting in a total recovery from said sales to the credit of the Sekular account in the amount $13,351.10.

On September 11, 1959, defendant received a written proof of loss form from Ps, submitting a claim for $46,173.45 against the bond written by Ps, for loss through fraud of Sekular in said order.

D by letter dated Sept. 17, 1959 denied liability under its bond for the type of loss claimed.

Under the date of Oct. 22, 1959 Hufty, Eubank and Russell, Inc., an insurance broker, wrote Defendant with reference to P's claim mentioning the name of Guren.

Under date of Nov. 10, 1959, counsel for Ps addressed a letter to D Company referring to the claim under the bond as based on the actions of Sekular and Guren.

D Company has continued to deny any liability under the bond for the loss claimed.

PLAINTIFFS assert that in August of 1959, their employee Guren entered into a scheme with Sekular for the purchase of 2300 shares of Television Management Shares Stock when issued: that neither could pay for that amount of stock, but they hoped that, after purchase, the price of stock would rise, so that it would immediately be resold at a profit; that the plan was for Guren to hold the check given him in payment for the stock by Sekular for a sufficiently long period of time so that resale could be effected and the proceeds of the sale deposited to cover the check.

That pursuant to the scheme, Guren, with Sekular's cooperation, represented to Ps that Sekular was a long time friend of considerable

wealth who desired to make a sizeable purchase of said stock when issued:

That upon issue of the stock on Aug. 10, 1959, pursuant to prior agreement with Sekular, Guren placed an order with Ps for the 2300 shares of stock and received a check signed by Sekular; that Guren kept the check in his possession until approximately Aug. 19, 1959, not withstanding repeated demands by Ps employees:

That upon receipt of the check by Ps, it was immediately deposited to the account of Ps and on Aug. 21, 1959 it was dishonored by the Suburban Trust Company, Hyattsville, Md., that said check was in the amount of $61,440.25.

Ps assert that they received notice of the dishonor Aug. 25, 1959.

Ps assert that after dishonor of the check repeated demands for payment in full were made upon Sekular by Ps, but the only amount paid by Sekular was $1900 on Aug. 26, 1959, although Sekular gave assurances that the balance would be immediately forthcoming:

That partial recovery through resale of 600 shares of the stock resulted in a further credit to the Sekular account of $13,351.10; that the balance of the stock was held by Ps until Dec. 24, 1959, when Ps purchased it for their own account for a total sales price of $27,200, less espenses, resulting in a further credit against the loss of $27,189.12.

Ps assert that Guren's complicity in the scheme was not learned by Ps until on or about Sept. 22, 1959; that Guren was discharged by Ps on Sept. 25, 1959, for the conduct above described; that the N. Y. Stock Exchange and National Association of Securities Dealers were immediately notified of the discharge.

Ps assert that the representations made by their employee Guren to Ps, in furtherance of the scheme of Sekular and Guren, were false, and were known to be false by Guren, in that Sekular was not a man of wealth, had never had a job of any substance, was in constant financial difficulty, and never had $61,000 in his life or any sum approximating that amount; that at the time of the issuance and dishonor of the check, Sekular had under $25 on deposit with Suburban Trust Co. and Guren

either knew, or should have known, that Sekular had only a nominal amount of money and no other assets of any appreciable amount.

Ps contend that the loss to Ps resulting from the acts of Guren was a loss within coverage A of D's bond, namely, a dishonest, fraudulent or criminal act by an employee,* in that:

1. Guren's actions were contrary to the rules** requiring that salesmen have knowledge of the financial ability of customers to fulfill obligations arising from their transactions.

2. His actions were contrary to Guren's fiduciary duty to his employer to disclose fully all facts of which he had knowledge which might react to his employer's detriment.

3. His acts were contrary to a rule** and to his promise to the American and N. Y. Stock Exchanges and to his employer not to take or receive, directly or indirectly, any share of the profit of any customer's account, as contained in his application to be accepted as a registered representative.

4. Guren's acts violated the following criminal statutes: 5 U.S.C. 371 (1958 ed.); 22 D.C. Code 1301 (1951 ed.); 22 D.C. Code 1410 (1951 ed.).

5. Guren made dishonest and wilful misrepresentations, described above, in furtherance of his fraudulent scheme with Sekular.

Ps contend that the loss to Ps resulting from the acts of Sekular was a loss within coverage B# of D's bond, in that:

---

*After this PT order was signed by counsel and the Examiner, counsel for P asked that it be amended by inserting after the word "employee" the words "and/or within coverage B of D's bond." Counsel for D objects. Counsel for P contends that the requested amendment is within his complaint.

**Rules of American and/or N.Y. Stock Exchanges and/or his employer, P. See stipulations as to specification to be furnished.

#After the PT order was signed by counsel and the Examiner, counsel for P requested that there be inserted after the word "coverage" the words "A and/or". Counsel for D objects. Counsel for P contends the requested amendment is within his complaint.

1. Sekular's acts were fraudulent in that he misrepresented his financial status to P and knew that he could not pay for the amount of stock purchased.

2. Sekular's actions violated pertinent criminal statutes; 5 U.S.C. 371 (1958 ed.); 22 D.C. Code 1301 (1951 ed.); 22 D.C. Code 1410 (1951 ed.).

Ps assert that timely and adequate notification of loss and demand for payment were made upon D but it has refused payment. Ps ask judgment against D for loss covered by D's bond in the amount of $19,552.20 with interest from September 17, 1959, attorney's fees and costs, the base claim being computed as follows:

Expenditures by Sade & Co. because of the transaction:

Purchase price plus commission		$61,440.55
Protest fee		2.36
Interest on loan which Ps had to get in order to pay for stock in issue:		
8-20-59 to 10-20-59 on $54,529	$499.50	
10-20-59 to 12-31-59 on $41,353	442.23	
1- 1-60 to 2-29-60 on $14,596	133.78	
		$ 1075.51
TOTAL EXPENDITURES		$62,518.42
Less: Receipts respecting the transaction		
Cash deposit by Sekular	$ 1,900.00	
Net from 9-1-59 sale	9,175.28	
Net from first 9-3-59 sale	2,095.91	
Net from second 9-3-59 sale	2,095.91	
Dividends received 11-16-59	510.00	
Net from 12-24-59 purchase	27,189.12	
TOTAL CREDITS		$42,966.22
Total actual damages		$19,552.20

(A credit of $4,323.03, transferred from the account of Guren's parents and credited to the loss is not reflected, inasmuch as it is the subject of a pending suit, CA 365-60.)

DEFENDANT denies any liability under the bond for the loss claimed by Ps on the following grounds:

1. The loss claimed herein did not result from any dishonest, fraudulent or criminal act of Ps' employee committed either alone or in collusion with another.

2. Any loss sustained by Ps resulted from the acts of a person other than Ps' employee, and between which person and Ps' employee, no collusion existed.

3. Any loss sustained by P resulted and was caused solely by their manner and method of operations, and such actions as they took unto themselves in the handling of this matter in a manner contrary to pertaining rules and regulations of the stock brokerage business.

4. The steps taken by Ps upon their ascertainment of the transaction constituted either their condonation or at least their acquiescnece to the transaction, as well as a waiver of any rights under the policy herein.

5. If D is liable herein, then and in that event Ps failed to mitigate their damages by converting and retaining the securities involved to their own ownership and account; by failing to sell the same at the purchaser's risk as obliged by regulation, and by failing to offer the same for sale, or to sell them timely.

6. Ps failed to give notice, in compliance with Sec. 3 of the bond, as to any claim based upon the alleged dishonest act of an employee.

7. D specifically denies that coverage B of the bond applies to any of the acts by either Guren or Sekular alleged by Ps, if they occurred; and if said coverage be held to apply, D denies the acts by Guren and Sekular alleged by Ps.

STIPULATIONS:

Facts under "UNDISPUTED FACTS"

It is stipulated the following may be admitted without formal proof of authenticity, subject to all other objections:

P's PT Exhibit #1 -- Bond (original or more legible copy to be substituted at trial) (also admitted to be relevant and material)

All of P's PT Exhibits as described on the attached list, EXCEPT #8, 14, 15 and 18. There is no number seven.

All records of the U.S. Atty. for the District of Columbia related to complaints made by Ps concerning this alleged transaction.

Counsel for D stipulates that in the transaction of their business Ps are subject to the rules and regulations of the N. Y. Stock Exchange, the American Stock Exchange, the Securities and Exchange Commission, the National Association of Securities Dealers, Inc., and the Board of Governors of the Federal Reserve System as well as other pertinent federal statutes and the laws of the District of Columbia.

Counsel agree to exchange, within two weeks, the names and addresses of all witnesses known to them, including experts, if any, (filing a copy with the Clerk of the Court) and if they learn of any additional witnesses prior to trial to exchange their names and addresses promptly.

Each counsel agrees to inform opposing counsel, within two weeks, the specific rules or regulations of the American and/or New York Stock Exchange and/or plaintiff or any other rules or regulations upon which he will rely.

Counsel for D has requested that Ps produce and make available at time of trial P's 1959 Partnership Information Return filed with the Internal Revenue. Ps do not so agree.

The Examiner has requested counsel to appear at trial with the maximum amount of authority to settle this case which will be allowed them by their principals.

TRIAL COUNSEL: Plaintiffs -- Lloyd J. Derrickson

Defendant-- Harry L. Ryan, Jr.

/s/ Elizabeth Bunten
Assistant Pretrial Examiner

/s/ Lloyd J. Derrickson For Plaintiffs

/s/ Harry L. Ryan, Jr. For Defendant

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D. C.

Friday, December 1, 1961

The above-captioned cause came on for hearing before the HONORABLE LUTHER W. YOUNGDAHL, United States District Judge, at approximately 2:30 o'clock p.m.

* * * * * * *

29 THE COURT: All right. I will have the defendant's statement.

35 MR. RYAN: *** On September 8 and 10, 600 shares of Television Shares Management were sold for a total recovery of $13,567.10. Nowhere in their proof of loss do they claim any collusion between Mr. Guren in bringing about this alleged transaction, nowhere in this proof of claim did they claim any dishonest act, any criminal act or any fraudulent act. This was the only proof of loss ever filed with National Surety Corporation. National Surety Corporation, after investigating the facts, determined it was nothing more than a trading loss, that they had accepted Mr. Sekuler upon his face value or representation to them, they took his $1900 and converted him into a credit customer.

* * * * * * *

48 Washington, D. C.

Monday, December 4, 1961

* * * * * * *

50 LEO SADE

called as a witness on behalf of Plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DERRICKSON:

Q. Would you state your name, please? A. Leo Sade.

Q. Would you tell us your occupation? A. I am a broker and a member of the New York Stock Exchange.

* * * * * * *

51 Q. Can you tell me the type of securities that your firm deals in? A. We deal in the highest grade securities, mostly listed, a percentage of listed -- the percentage is 85 per cent in the New York Stock Exchange, the American Stock Exchange and other exchanges.

Q. In the course of your duties is it necessary for you to follow the market price of securities and analyze companies which issue these securities? A. That is correct.

* * * * * * *

BY MR. DERRICKSON:

Q. You are a partner in Sade & Company? A. I am.

Q. And are you the principal partner authorized to speak in this matter? A. That is correct.

Q. Can you contrast the over-the-counter market with the New York Stock Exchange or listed markets? I'm sorry. May I rephrase that and ask you to describe the over-the-counter market?

* * * * * * *

* * * * * * *

52 THE COURT: I think what counsel is after, I think, is for you to describe the mechanical operation of the over-the-counter market in reference to purchase and sale as compared with the New York Stock Exchange, the registered exchange. How do they differ in their mechanical operation?

THE WITNESS: On the New York Stock Exchange you put an order through on the wire, you send it in to the floor broker, if it is a market order he will execute the best of his judgment within an eighth or a quarter difference.

THE COURT: Unless he has a definite order?

THE WITNESS: Unless he has a definite and specific order, then it is handed over to a specialist and if it reached that figure it will be executed. In over-the-counter, you pick up the pink sheets, what we call a booklet published daily by -- what do you call them --

BY MR. DERRICKSON:

Q. The National Daily Quotations? A. The National Daily Quotations, and you see the brokers that are interested in the stock and you start calling them on the phone directly or on teletype service and bidding
53 in for the stock or offering them stock, either way.

Q. In other words, the New York Stock Exchange is an auction market in the sense that you come to that market and you know that they have the securities available and you know what the definite prices will be? A. At all times.

* * * * * * *

BY MR. DERRICKSON:

Q. And the over-the-counter market is a negotiated market between brokers; is that correct? A. That's correct.

Q. So your firm deals in both types of securities. Do most firms?

A. All member houses deal in both.

Q. All Stock Exchange member houses? A. Yes.

* * * * * * *

54 BY MR. DERRICKSON:

Q. In the over-the-counter market are Mutual Funds sold, investment companies? A. All Mutual Fund investment companies are over-the-counter.

THE COURT: You mean Mutual Funds are sold only in over-the-counter, and not on the big board, is that what you are saying?

THE WITNESS: That is correct.

BY MR. DERRICKSON:

Q. In addition only new issues can be sold over-the-counter?
55 A. All new issues, no matter how large the company is, can not be listed on the New York Stock Exchange or any other stock exchange for a long period of time, until they qualify for the number of shares and dividend and other things involved.

Q. Can you state, Mr. Sade, the approximate number of transactions per day which your firm had during the month of August and

September? A. I don't recall exactly, but I can give an average, 150 transactions a day to 200.

THE COURT: Of what year?

MR. DERRICKSON: 1959, Your Honor.

BY MR. DERRICKSON:

Q. And can you tell me the approximate dollar volume of those transactions during those two months? A. Some are $1,000 and we have also half a million dollars.

Q. So it varies and the average might be -- can you give me an approximate average monthly or annually that your firm does? A. I'd say an average of every transaction, I would say the average would probably be $20,000 as an average.

Q. And would you describe the type of clientele which your firm has, the type of customers it deals with? A. We have the finest clientele
56 in the city.

Q. Would they be retail customers, banks, insurance companies? A. Banks, insurance companies.

Q. Pension Funds? A. Pension Funds, Unions.

Q. I have in my hand Plaintiffs' Exhibit marked No. 34, for identification, which appears to be a broker's blanket bond from National Surety Company issued to Sade & Company in the amount of, originally, $50,000. This bond is dated May 20, 1959. I hand this to you and ask you if this is the bond? A. Yes, this is the bond.

MR. DERRICKSON: Your Honor, I offer this in evidence.

* * * * * * *

57 (Broker's blanket bond from National Surety Corporation, Plaintiff's Exhibit No. 34, was received in evidence.)

BY MR. DERRICKSON:

Q. Now, Mr. Sade, can you tell me if a premium was paid on this bond?

MR. RYAN: We don't dispute that.

* * * * * * *

BY MR. DERRICKSON:

Q. *** In order to be sure we are not skipping anything, I would like to ask one question. Was the bond ever terminated? A. Never. We raised it, we carried $300,000 with them.

Q. At a later date?

THE COURT: There is no dispute about the fact that they were bonded.

MR. RYAN: No, Your Honor, no dispute.

BY MR. DERRICKSON:

58 Q. Now, Mr. Sade, I call your attention to another matter, that is the employment of a person named S. Thomas Guren. Did Sade & Company ever employ S. Thomas Guren? A. Yes, we did.

* * * * * * *

BY MR. DERRICKSON:

Q. Can you state at the time when Mr. Guren was first employed by Sade & Company? A. I don't recall the exact date.

Q. I hand you the application to refresh your memory. A. July 28, 1958.

Q. And can you tell me when, if he was discharged, and the approximate date? A. The approximate date would be September, I think

59 September 1959.

Q. Fine. When Mr. Guren was employed did he go through a period during which he was trained in the securities business? A. Yes.

Q. How to handle transactions? A. It is required to train a person for six months, according to the regulations of the New York Stock Exchange.

Q. Was Mr. Guren eventually approved after he took the test of the New York Stock Exchange? A. He was.

Q. As a representative of the Exchange? A. That's correct.

Q. And of the American Stock Exchange, too? A. Right.

Q. And as such he was apprised of the rules and regulations dealing with customers' funds, the handling of checks, and the requirements of the Federal Reserve Board? A. Right.

Q. Had your firm ever received any complaint as to Thomas Guren's activities of any kind? A. No.

Q. Had you any reason to suspect Thomas Guren's honesty up
60 until the occurrence which is the subject of this suit? A. No.

MR. RYAN: I object to that, if Your Honor please.

THE COURT: The answer may stand.

* * * * * * *

61 BY MR. DERRICKSON:

Q. Can you state what Mr. Guren's approximate earnings were during the time he was an employee --

MR. RYAN: If Your Honor please, the actual records will show, if it is material.

MR. DERRICKSON: May I read, Your Honor --

THE COURT: Well, --

MR. DERRICKSON: The records indicate at no time Mr. Guren earned more than $866 in any one month.

THE COURT: I don't see the materiality, but I suppose the records will indicate.

* * * * * * *

BY MR. DERRICKSON:

Q. Mr. Sade, are you familiar with a company called Television
62 Shares Management Company? A. I am.

* * * * * * *

BY MR. DERRICKSON:

Q. Yes. Will you tell us the general nature of the business?
63 A. Television Share Management manages the shares of a fund called Television Electronics and they control $400 million of investments of the public which invested in the Mutual Fund. The Management, itself,

gets half of one per cent of the total investments every year, and I would like to point out that Television Electronics Fund is the highest grade security in it, and they have over 100,000 shares of American Telephone & Telegraph among their portfolio. But the total amount that they invest is $400 million, the total assets of the company.

Q. And do you know approximately how old the company is?

A. The company is between 25 and 30 years. It was formed right after the first depression years.

Q. Is that company continuously offering its shares to the public?

A. Continually. It is an open-ended fund.

Q. That is Television Shares Fund? A. Right.

Q. Now, Television Management Company, can you tell us what that is? You have stated it manages the investments for that Fund.

A. Right.

Q. Now can you tell me on or about August 10 whether this Tele-

64 vision Management Company offered securities to the public for the first time? A. Yes, they offered them and through very prominent brokers in New York; one is White Weld which is one of the five highest houses in Wall Street.

Q. Was it considered an investment as opposed to speculation?

A. By some it is considered an investment and by some it is considered a fast dollar, but some of the Management went wild in the last two months before this came out. A lot of free riders --

Q. When you say they went wild and there were free riders, you mean the stock was offered to the public at a specified price? A. Right.

* * * * * * *

65 BY MR. DERRICKSON:

Q. In 1959. So, at that time you stated there was a great interest of the public in the Management Company stock? A. Correct.

Q. So, August 10, when that security was issued, did your firm participate in the distribution? A. No, we were not underwriters, because we have never dealt much with these firms.

* * * * * * *

BY MR. DERRICKSON:

Q. The answer is no. Among the salesmen in your office was there an interest in this security? Did they want the firm to buy it so they could sell it to their customers? A. Yes.

* * * * * * *

66 Q. Mr. Sade, on August 10, 1959, did there come a time when, to your knowledge, Mr. Guren, S. Thomas Guren, placed an order for the
67 purchase of a total of 2300 shares of Television Shares Management stock? A. Yes. Either that day or the day after.

THE COURT: That day or day after what date?

MR. DERRICKSON: August 10, Your Honor.

THE COURT: You say either on August 10 or August 11 this came to your knowledge?

THE WITNESS: Right.

BY MR. DERRICKSON:

Q. Now I show you Plaintiffs' Exhibits marked for identification 12 and 13, which appear to be the orders entered by Mr. Guren to the firm for the purchase of these shares, and I ask you if these aren't those orders? A. Yes, it's his own handwriting.

THE COURT: Whose handwriting?

THE WITNESS: Duren's handwriting.

MR. DERRICKSON: I offer these.

* * * * * * *

MR. RYAN: No objection.

THE COURT: Received.

(Plaintiffs' Exhibits 12 and 13, Order for 2300 Shares of Television Shares Management stock, were received in evidence.)

68 MR. DERRICKSON: I have Plaintiffs' 14, the confirmation sent to Sekuler.

THE COURT: Any objection to 14?

MR. RYAN: No objection.

THE COURT: It will be received.

(Plaintiffs' Exhibit No. 14, Confirmation to Sekuler, was received in evidence.)

MR. DERRICKSON: And 15, which is further confirmation.

MR. RYAN: No objection to 15, Your Honor.

THE COURT: Received.

(Plaintiffs' Exhibit No. 15, further Confirmation, was received in evidence.)

* * * * * * *

71 BY MR. DERRICKSON:

Q. Mr. Sade, I show you Plaintiffs' Exhibits No. 1 and No. 2, which appear to be checks drawn by Sade & Company on the Riggs Bank. Can you explain if they were payment for Television Shares Management stock in the amount of 2300 shares?

MR. RYAN: If Your Honor please, I concede they say on there they are.

THE COURT: He is asking whether they were.

THE WITNESS: Right. That's the total amount we bought for shares -- we bought more shares than was actually involved here. One check is for 1300, that is correct; the other check contains other purchases, also of Television, which was meant for other fellows in the office, but we paid them a total amount, both checks included our purchase of Television Electronics. These are the checks we paid and they cleared through the bank.

BY MR. DERRICKSON?

Q. So this was payment for the shares Mr. Sekuler purchased?

72 A. That's correct.

MR. DERRICKSON: I offer these in evidence.

THE COURT: They will be received.

(Plaintiffs' Exhibits 1 and 2, Checks, were received in evidence.)

BY MR. DERRICKSON:

Q. Mr. Sade, can you tell me when you were first aware that the order for these shares was placed by Thomas Guren for Mr. Sekuler? A. Either the evening after the purchase or next morning.

THE COURT: What was that question, again?

MR. DERRICKSON: I am sorry, Your Honor. I asked him when he first became aware of this order.

THE COURT: He said before the 10th, he already answered that, I thought, either the 10th or 11th.

MR. DERRICKSON: Yes.

BY MR. DERRICKSON:

Q. How did you become aware of it, Mr. Sade? A. I usually go through all purchases and sales of the company either the evening or the next day.

Q. Now I show you Plaintiffs' Exhibit marked No. 16, which appears to be the check drawn by Stanley Sekuler, would you identify that and tell me what it is? A. That is a check given to us for payment of the Tele-
73 vision Electronics shares.

MR. DERRICKSON: I offer this, Your Honor, to show -- as No. 16.

THE COURT: No. 16; any objection?

MR. RYAN: No objection, if Your Honor please, to the piece of paper as such, insofar as the words "AUG." appear on it, as part of the date and insofar as the signature of Stanley Sekuler appears on it. The rest of it I object to at this point.

THE COURT: It will be received.

(Plaintiff's Exhibit No. 16, check signed by Sekuler, was received in evidence.)

BY MR. DERRICKSON:

Q. Can you tell me, Mr. Sade, when this check was received by your firm?

* * * * * * *

A. It was received on the last day of payment after one of my part-
74 ners kept calling him several times and he disappeared from the office.

THE COURT: Just answer the question. The question only relates to the time when the check was received, if you know.

MR. RYAN: By his company, does that mean, if Your Honor please, by Mr. Guren or by somebody --

THE COURT: What do you mean by the question, counsel?

MR. DERRICKSON: By his company, I meant by an official --

THE COURT: All right. The question now is, if you know when the check was received by your company.

BY MR. DERRICKSON:

Q. You stated on the last day. A. As far as I can recall, around the 17th or 18th of August, something like that.

Q. Now, if the transaction was on August 10, when would be the last day that you could accept payment? A. The last day would have been probably seven days, without asking for permission from the National Association of Security Dealers.

Q. Is that seven days? A. Seven business days.

75 Q. So, it is your recollection that this check was received on the seventh business day after the 10th of August? A. Positively.

Q. I show you Plaintiffs' Exhibit marked 4 and 5, which appear to be time sheets for your firm during the period August 15 to the 21st and I ask you if that is a fact? A. That is correct.

MR. DERRICKSON: I offer these as Plaintiffs' Exhibits Nos. 4 and 5, Your Honor.

MR. RYAN: No objection.

THE COURT: They will be received.

(Plaintiffs' Exhibits 4 and 5, Time Sheets, were received in evidence.)

BY MR. DERRICKSON:

Q. Now, between the 10th and 11th, when you first became aware of the order, and the 19th, did you know the whereabouts of this check?

A. Not the first few days. Miss Mahon, the partner in the firm, she knew.

MR. RYAN: I object.

THE COURT: The question was whether between the 10th and 17th you knew the whereabouts of the check, any time between those days.

THE WITNESS: Yes, we did.

76 THE COURT: The question was whether you knew the whereabouts.

THE WITNESS: You mean personally?

THE COURT: Yes.

THE WITNESS: I don't remember the exact date when I did know or didn't. I just want to make that clear.

BY MR. DERRICKSON:

Q. In other words, you don't have any recollection of your own that Thomas Guren ever told you that he had the check? A. That's about what it is.

Q. I show you Plaintiffs' Exhibits 17 and 18, which are notifications from the Suburban Trust Company and Security Bank that the check was drawn with insufficient funds and ask you to identify them as such.

A. That's correct.

THE COURT: Any objection to these two?

MR. RYAN: No, Your Honor.

THE COURT: Received.

(Plaintiffs' Exhibits 17 and 18, Bank Notifications of insufficient funds, were received in evidence.)

BY MR. DERRICKSON:

Q. Now, when you received this notice dated the 25th, Mr. Sade,

what action did you take? A. I immediately called for Mr. Guren and
77 I was notified that he was out of town.

THE COURT: You immediately did what?

THE WITNESS: I called Guren, which was in the employ of our office.

THE COURT: What do you mean, called him?

THE WITNESS: He wasn't in the office.

THE COURT: You called him at his home?

THE WITNESS: Right. Yes, Your Honor.

BY MR. DERRICKSON?

Q. And were you able to reach him at his home? A. No.

* * * * * * *

BY MR. DERRICKSON:

Q. In any event, you were unable to reach Mr. Guren? A. That is correct.***

* * * * * * *

78 BY MR. DERRICKSON:

Q. Now I show you Exhibit No. 19 which appears to be a telegram. Would you identify that? A. That is correct.

THE COURT: Any objection to 19?

MR. RYAN: No objection to 19.

THE COURT: Received.

(Plaintiffs' Exhibit No. 19, Telegram, was received in evidence.)

Q. Did you attempt to contact Mr. Sekuler on the 25th? A. We did.

* * * * * * *

BY MR. DERRICKSON:

Q. And when you contacted Mr. Sekuler, did you advise him that his check had been returned? A. Correct.

* * * * * * *

79 Q. On August 26th, did Mr. Sekuler come into your office, Mr. Sade, on or about August 26th? A. Right.

Q. And did he make a deposit in cash? A. He made a deposit in cash of $1900.

* * * * * * *

80 BY MR. DERRICKSON:

Q. And at that time did Mr. Sekuler reject the purchase of the stock?

MR. RYAN: I object to that, if Your Honor please.

* * * * * * *

MR. DERRICKSON: *** I will ask him if he gave him any written notice that he didn't desire to have the stock.

THE COURT: Just answer yes, or no, if he gave you any written notice.

THE WITNESS: No written notice.

BY MR. DERRICKSON:

Q. Now, on or about September 1st, did your firm sell 400 shares of Television Shares Management Company at 23-1/4? A. Correct.

* * * * * * *

81 BY MR. DERRICKSON:

Q. Can you tell me, Mr. Sade, why your firm sold these shares September 1st, 2300 shares September 1st? A. For a couple of reasons. One, we couldn't carry too much of a load, we had other securities against our capital and we had to sell it. Number two, we sold the stock to our own clients, not to load the market with it, because we couldn't have gotten the same price that day, we sold to our clients. In order to recover part of our capital investment we started to sell, knowing that -- I could see at that time that we couldn't get anywhere, they were not going to recover the money.

THE COURT: Did you make any effort to sell over-the-counter to any other clients?

THE WITNESS: I tried; they didn't even want to buy it from me.

THE COURT: How many did you try?

THE WITNESS: I tried White Weld, Dean Whitter, they didn't want to touch that stock any more. It can't be proved.

82 BY MR. DERRICKSON:

Q. And can you tell me why the market began to go down on that stock at that particular time?

MR. RYAN: I object to that, if Your Honor please.

THE COURT: He may answer. He may give his opinion.

MR. RYAN: Well, I think that is his opinion as to why the market went down.

THE COURT: This is just a matter of an opinion.

MR.RYAN: I will withdraw the objection.

THE COURT: Subject to any other evidence, it is opinion evidence.

THE WITNESS: This stock would have acted well too had it not been for the Chairman of the Securities & Exchange Commission, who made a remark in Boston that day that he is going to look into all management stocks, that is the only reason the stock fell at that time and nobody wanted to buy it. Every magazine of the country carried it and was explaining exactly why.

MR. RYAN: I object to that and I think that it is certainly a reckless statement, every magazine.

THE WITNESS: It's not a reckless statement, it's every magazine.

THE COURT: Now, you want to be a little careful about your ans-

83 wers. You mean the Ladies Home Journal carried it?

THE WITNESS: No, Your Honor.

THE COURT: You said every magazine in the country. Isn't the Ladies Home Journal a magazine?

THE WITNESS: I will amend; every business magazine.

THE COURT: Then you want to be a little careful about your answers. That is what counsel objected to.

You don't want that answer to stand, do you? You don't mean that Sports Illustrated carried it, too?

THE WITNESS: No, Your Honor.

THE COURT: Then you better change your answer to the question.

THE WITNESS: All right. I will say the major financial magazines.

THE COURT: All right.

* * * * * * *

84 BY MR. DERRICKSON:

Q. Did you offer these securities to anyone else at less than 23-1/4? A. I offered it to sell the whole thing combined if they give me one figure at $19 and I will sell it, and they wouldn't accept that bid because there were too many shares. They would only accept 100 shares at the time and a difference of half a point to three-quarters of a point between every hundred shares.

Q. Would you have been able to sell 100-share lots? In other words, not the whole amount. Did you offer 100-share lots to any brokers? A. No, I couldn't even do that because once you start to sell 100, only four brokers were interested in it in the country, in that stock, at the time. They knew I was the seller. Once they knew that they dropped their bids.

Q. In other words, you drive the price down on yourself? A. That is correct.

Q. Is that because the number of stockholders in that company was relatively small, there wasn't a wide market? A. It was just a new established market and any new established market, especially it was a down-trend and the market didn't help it, either, the general market
85 went down, too. It was a combination of all the factors.

Q. So that, it was, in your opinion, as a broker, the prudent thing to hang on to the rest of the shares? A. It's not the question.

MR. RYAN: Just a moment.

THE COURT: Counsel, you are testifying. You are not under oath right now. You better ask him about it.

MR. DERRICKSON: I beg your pardon.

THE COURT: You better ask him to give the answer.

MR. DERRICKSON: All right, Your Honor.

BY MR. DERRICKSON:

Q. The point is, Mr. Sade, in your opinion general market conditions --

THE COURT: Well, he already testified --

BY MR. DERRICKSON:

Q. -- were poor, so it was his opinion to hold on --

THE COURT: Now you are testifying again.

BY MR. DERRICKSON:

Q. What was your opinion --

THE COURT: He already testified because of general market conditions and offers he made he couldn't sell any more at that time.

MR. DERRICKSON: I am sorry. We withdraw that.

86 BY MR. DERRICKSON:

Q. On September 1st, Mr. Sade, did you have conversations with Mr. and Mrs. William Guren, the parents of Thomas Guren? A. Right.

Q. At that time did they authorize and transfer to their son's account securities in their own account?

MR. RYAN: If Your Honor please, I object.

THE COURT: That depends on conversations. Sustain the objection.

MR. DERRICKSON: I offer Plaintiffs' Exhibit 20, which is a letter dated September 1st, 1959, and --

BY MR. DERRICKSON:

Q. I ask you if that is an authorization to transfer? A. That is correct.

MR. DERRICKSON: I offer this, Your Honor.

MR. RYAN: I object to that, if Your Honor please.

THE COURT: Let me see it.

MR. RYAN: It is a letter from the parents of this man.

THE COURT: It will be received.

(Plaintiffs' Exhibit No. 20, letter dated Sept. 1, 1959, was received in evidence.)

BY MR. DERRICKSON:

87 Q. I offer Plaintiffs' Exhibit marked 21, which appears to be a letter from Thomas Guren authorizing the transfer of the funds in his account to Mr. Sekuler's loss; is that such a letter? A. Correct.

MR. DERRICKSON: I offer this, Your Honor, No. 21.

MR. RYAN: No objection.

THE COURT: Twenty-one is received.

(Plaintiffs' Exhibit No. 21, Letter from Thomas Guren, was received in evidence.)

BY MR. DERRICKSON:

Q. Now, on or about September 21st, did you call Mr. Stanley Sekuler -- correction, strike that.

After the deposit of $1900 on August 26th by Stanley Sekuler, at which time the balance, the debit balance in his account was some $59,000, did he make any other offers of payment?

MR. RYAN: I object to offers of payment. The question, I think, properly is if he made any further payments.

THE COURT: All right. The question may stand whether he made any other payments.

THE WITNESS: No.

BY MR. DERRICKSON:

Q. Has he made any payments since that time? A. No.

88 * * * * * * *

Q. On September 11, 1959, did you file a proof of loss with the National Surety Company based upon a bad check given by Sekuler, and I show you -- I am sorry, answer that question. A. Yes.

Q. I show you Plaintiffs' Exhibit 22 and ask you if this is that proof of loss? A. Right.

MR. DERRICKSON: I offer this, Your Honor.

THE COURT: Any objection to this?

MR. RYAN: No objection.

THE COURT: Received.

(Plaintiffs' Exhibit 22, Proof of Loss dated Sept. 11, 1959, was received in evidence.)

* * * * * * *

92 BY MR. DERRICKSON:

Q. Mr. Sade, I direct your attention to the previous remarked -- correction -- to my previous question concerning Mrs. Sekuler in the meeting which she had with representatives of the bonding company and with you and others. Did the conversation take place between you and Mrs. Sekuler in which the bonding company representative was present? A. In their presence.

Q. In their presence? A. Yes.

93 Q. And did Mrs. Sekuler tell you why she was there that day at the meeting? A. Yes, she did.

MR. RYAN: I object to what Mrs. Sekuler told him.

THE COURT: He may state what the conversation was at that meeting.

MR. RYAN: With the admonition, if Your Honor please, that he may not relate what she heard somebody else say.

THE COURT: You should not state what Mrs. Sekuler said somebody else said, but what she, herself, said.

* * * * * * *

THE COURT: You cannot testify as to the fact Mrs. Sekuler said at that meeting somebody else told her something, just what she, herself, said.

* * * * * * *

95 BY MR. DERRICKSON:

Q. I want to ask you a question, just answer the question as I put it. She mentioned S. Thomas Guren; did she mention anything about his financial status? A. She did.

Q. And what did she say? A. He's in very tough financial situation.

* * * * * * *

BY MR. DERRICKSON:

Q. Did she state anything as to the husband's financial condition?

MR. RYAN: I object to that.

96 THE COURT: He may answer.

THE WITNESS: The husband was even worse.

* * * * * * *

THE COURT: This doesn't prove her husband has nothing, the mere fact that she said it.

MR. DERRICKSON: I understand.

THE COURT: The mere fact she says her husband has nothing doesn't prove it to me. It is no use you putting in this evidence unless you are going to have some other evidence here that that is a fact.

97 MR. DERRICKSON: I am, Your Honor.

THE COURT: Then it is no use going into this conversation.

MR. DERRICKSON: The problem we are having, Your Honor --

THE COURT: No use discussing it. I am the Judge who has got to decide the issue of fact. This doesn't prove her husband has nothing, the mere fact that she said it.

MR. DERRICKSON: I understand that, Your Honor.

THE COURT: That is all the question relates to, so why take the time to ask it.

MR. DERRICKSON: Not to argue with His Honor, I am asking it to show what his financial condition was.

THE COURT: It doesn't show her husband's financial condition.

MR. DERRICKSON: It is the best evidence we have.

THE COURT: It is no evidence, what she said, as to his financial condition, the mere fact that she says it. It is no evidence to me, it doesn't prove it to me.

* * * * * * *

98 BY MR. DERRICKSON:

Q. Did she state S. Thomas Guren was involved in this purchase with Mr. Sekuler? A. Correct.

Q. Did she state the profits would be split between them? A. Correct.

MR. RYAN: I object to this as leading, if nothing else, your Honor.

THE COURT: Right. Ask him what the conversation was, counsel.

BY MR. DERRICKSON:

Q. What was the conversation as to the relations between Mr. Guren and Mr. Sekuler, put it briefly. How long had they known each other? A. They have known each other most of their lives and they have
99 been -- I have already said that before, they have been in and out of deals together. The fact is that he tried to get him in on one, in order to buy it together, and share profits, 50-50, and she didn't want to tell us at the beginning, but after she knew that the transaction was completed and she didn't want her husband -- in spite of the fact she said her husband did the wrong thing, she didn't want him to take the rap for Mr. Guren, too, therefore, she better tell us the exact truth what happened. That is why she came down, we didn't force her or ask her for it.

Q. Thank you. I now show you Plaintiffs' Exhibit 25, which is a statement signed by Ann Sekuler and ask you if you were the witness to that statement? A. That is correct.

Q. Was that statement made on the same day? A. On the same day and in the presence of the insurance representatives.

Q. In other words, the substance of this written statement -- A. It's right in there.

MR. DERRICKSON: I offer this, Your Honor, Plaintiffs' 25.

MR. RYAN: I object to that, if Your Honor please. This is the statement of Mrs. Sekuler. We have already heard hearsay as to what
100 she testified to.

THE COURT: This is hearsay. This is hearsay. Sustain the objection.

* * * * * * *

101 BY MR. DERRICKSON:

Q. Between September 3rd, when you last made the sale of Television Shares Management, did you attempt to offer the shares to any other brokers or dealers or any other customers? A. We tried.

Q. And what were the results of your efforts? A. The result was that I couldn't sell more than a hundred shares.

Q. And why couldn't you sell more than a hundred shares? A. Nobody wanted to get in and buy the stock. Many issues, it happens from time to time that you can't sell them.

* * * * * * *

103 BY MR. DERRICKSON:

Q. Is it your testimony during the period from all of September through December it was impossible to sell the stock? A. That is correct.

* * * * * * *

Q. Could you have sold the stock at a great loss, Mr. Sade? A. I could have, a very sharp loss.

Q. Would you tell me what your calculations were as to the amount of that loss during that period?

THE COURT: He will have to base that on actual attempts that were made and offers he had.

MR. DERRICKSON: Yes, sir.

* * * * * * *

MR. DERRICKSON: Excuse me. I have here the quotations of the National Daily Quotation Service, which was supplied to Mr. Ryan and myself, Plaintiffs' Exhibit 22.

BY MR. DERRICKSON:

Q. I ask you if you are familiar, and if you have reviewed --

104 THE COURT: That has been received, hasn't it, Plaintiffs' Exhibit No. 22 has been received?

MR. DERRICKSON: I am sorry, I have made a mistake, Your Honor.

I ask this be marked as Plaintiffs' Exhibit 37.

(Plaintiffs' Exhibit No. 37, National Daily Quotation Service quotations, was marked for identification.)

THE COURT: These quotations, is there any objection to them?

MR. RYAN: If Your Honor please, I think this is the nub of the case we are finally getting to now. I have no objection to them.

THE COURT: Received.

(Plaintiffs' Exhibit No. 37, heretofore marked for identification, was received in evidence.)

* * * * * * *

105 BY MR. DERRICKSON:

Q. During the period from September 1st through December 24th, was there ever an offer by any dealer to buy more than 100 shares of this stock?

MR. RYAN: I object to that, if Your Honor please.

THE COURT: To him, personally, you mean?

MR. DERRICKSON: In these sheets.

THE COURT: The sheets speak for themselves.

* * * * * * *

107 BY MR. DERRICKSON:

Q. I show you Plaintiffs' Exhibits 31 and 33, which are the ledger accounts of your firm for Thomas Guren and Stanley Sekuler, and ask you if they are such? A. Yes.

MR. DERRICKSON: I offer these, Your Honor.

MR. RYAN: No objection

THE COURT: Received.

(Plaintiffs' Exhibits 31 and 33, Ledger Sheets, were received in evidence.)

* * * * * * *

110 BY MR. DERRICKSON:

Q. I have here, Mr. Sade, a letter to you from Mr. Bailey of the National Surety Company rejecting the first claim based solely on the bad check. A. That's right.

MR. DERRICKSON: I offer it, Your Honor, No. 23, sir.

THE COURT: Is there any objection to that?

MR. RYAN: No objection.

THE COURT: Received.

(Plaintiffs' Exhibit No. 23, Letter to Mr. Sade from National Surety Co., was received in evidence.)

* * * * * * *

112 THE COURT: Sustain the objection to these two because it is already conceded that notice was received by the company as to your claim.

* * * * * * *

113 BY MR. DERRICKSON:

Q. Mr. Sade, in your brokerage business, you testified that you
114 might have up to 75 transactions per day; is that correct?

A. Seventy-five, sometimes two hundred a day.

Q. Sometimes 200? A. Yes.

Q. In the normal course of events, when a check is received by a registered representative, what is his duty in respect to that check?

A. If he doesn't know the person he has to contact the sales manager, if it's a new account, and the sales manager contacts the bank or whatever other place he can to investigate the party. But the number one instruction in the office, and in all meetings, is know your customer, you have to know your customer well.

Q. So that it's the responsibility of the representative to know with whom he is dealing? A. That's correct.

Q. And under Regulation T is it your understanding and your custom and knowledge in the business that the customer must have the funds

ready to pay for the securities at the time that he enters the order? A. That's correct.

Q. So that the representative under no circumstances can take an order which is conditional upon the receipt of the funds by the pur-
115 chaser at some later date? A. That is correct.

Q. So that there might be 75 to 200 checks per day come through your cashier's office? A. Yes.

Q. Would it be possible on all checks on which there might be a question, because of not having sufficient knowledge of the customers, would it be convenient to call the bank and to inquire as to the status of the account? A. Not unless it's the bank that we are dealing with, otherwise, it is very hard to get it.

Q. But you have on occasion done that? A. From time to time.

Q. But it's not a practice? A. It's not a practice at all.

Q. And within the past two years, can you recall on how many occasions you received checks which were returned for insufficient funds? A. I don't remember any. It would have been brought to my attention, except that is the only one.

Q. So, confining my statement to the year 1959, to your recollection this was the only check returned for insufficient funds? A. To my recollection I don't know of any other checks returned for insufficient funds.

116 Q. Is there a custom and usage in the business when there is a question as to whether the securities were paid for, that you must give notice to a customer that you intend to sell the securities? A. We have to; if we don't and -- may I give an example? If I would have without sending a wire to the party and the stock goes up, he will sue me for the profit and it happened before in cases with members of the New York Stock Exchange. You just don't sell out to anybody. ***

* * * * * * *

BY MR. DERRICKSON:

Q. In other words, it's a custom to give the notice so the person can either pay up or else you then have the right to sell? A. Then I have the right to go ahead and sell it for his account. Without that, I mean, the New York Stock Exchange would look upon that later on, they can sue us for the profit; in case the stock went up they would sue us for the profits.

* * * * * * *

117 CROSS-EXAMINATION

BY MR. RYAN:

Q. Mr. Sade, you have stated to us that before finally permitting Mr. Guren to operate as one of your representatives he was given an extensive course of about six months' training; is that right? A. I don't know that it is a course; to some we give courses, but he was under the jurisdiction of two people in the office and they trained him. They trained him very carefully.

* * * * * * *

118 BY MR. RYAN:

Q. Now, the practices of your office, among other things, require that when a purchase of stock is made for a customer, either payment be made for that stock or credit arrangements made in advance; is that correct? A. Yes.

Q. In connection with the purchase of that stock which is in issue here, I understand, and I will accept the fact Mr. Sekuler had not traded with your company before, had he? A. That is correct.

Q. This was his first transaction with you? A. I am assuming that is correct.

Q. Have you examined your books or records to see whether or not he had traded with you on any prior occasion? A. I would say, without looking back, I'd say he was a first-time customer.

MR. DERRICKSON: May I show him his ledger account, Mr. Ryan? Would you like him to have it?

THE COURT: Do you contend he had previously traded?

MR. DERRICKSON: No.

THE COURT: You admit this is the first time?

MR. DERRICKSON: Yes, sir.

THE COURT: Then it is conceded.

BY MR. RYAN:

119 Q. Is it unusual, Mr. Sade, in your business, to have a first-time customer come in and make a purchase of something in excess of $50,000 in securities? A. I have done, with a first-time customer, $700,000 in the same day and got a deposit and it cleared the account. It's not very unusual.

Q. It's not unusual? A. It's not unusual for somebody coming in and making a purchase of $60,000.

Q. That isn't the question. I said a first-time purchaser, is it unusual or usual for him to come in and put an order down for more than $50,000 worth of securities? A. It's unusual for a man that a customer's man doesn't know, but a man he grew up with, he takes his word, he represents me, he is an agent of mine.

Q. I will ask you if you listen to my question, and please try to answer it. A. Yes. But some questions I cannot answer yes, or no.

Q. Don't you know whether or not it is usual or unusual for a first-time customer to come into your place and place an initial order, his very first transaction with you -- A. It's not unusual.

Q. It is not unusual? A. Right.

* * * * * * *

120 BY MR. RYAN:

Q. Mr. Sade, I am showing you Plaintiffs' Exhibit No. 16, the dishonored check which is in issue in this case. It bears the date August 19, does it not? A. Right.

Q. Is it 19 and the August in the same handwriting, as far as you know? A. It's a different pen, that, at least I can see, it's two different things.

Q. Different ink? A. Different ink.

Q. Different color. Now, do you know when it was that this check first came into the possession of Mr. S. Thomas Guren? A. To my knowledge it came in the day that he ordered the securities.

Q. That is when, August 10th? A. Tenth or ninth, I think it's the tenth, right.

Q. When it came in on August 10, it didn't have August 19th on it then, did it, sir? A. I don't know.

Q. Did it have Sade & Company typed on it and $61,440.55 typed on it? Did it have that on it on August 10?

121 MR. DERRICKSON: We concede it was delivered in blank, Your Honor.

THE COURT: He has a right to cross-examine.

THE WITNESS: Now, I remember. It's a long time away. He gave him a check, signed by him and the reason for it, that he didn't fill it out completely is that he didn't know what the commissions would amount to.

BY MR. RYAN:

Q. So, August 10, when you accepted -- Sade & Company accepted an order for the purchase of 2300 shares -- A. Right.

Q. -- of this stock from Mr. Stanley H. Sekuler, you didn't know what the purchase price would be, you didn't know what the commissions would be, you didn't know what the cost would be, did you? A. That's exactly right. We didn't know what the price of the stock would be in the morning. He bought two different lots, bought two different prices, right.

Q. That's right. A. So --

Q. And despite that, you accepted, or your representative on that day, presumably -- A. We didn't accept it.

122 Q. You did not accept his check? A. His check was in his pocket.

Q. In whose pocket? A. In the representative's pocket, and he disappeared from the office.

Q. It was in Mr. Guren's pocket? A. That's correct.

Q. Did it come out of Mr. Sekuler's pocket and get to Mr. Guren? A. Right.

Q. On or about August 10? A. That's correct.

Q. Now, you confirmed, as you have indicated here, this purchase for Mr. Sekuler's account of these 2300 shares of stock? A. Right.

Q. By notices dated August 10, and calling for settlement on August 14; is that right? A. Right.

Q. Now, on August 14, Mr. Sade, you had not received from Mr. Guren the check which Mr. Sekuler had given to Mr. Guren; is that right? A. I am assuming it is right.

Q. Well, you told us earlier this morning that you didn't get that check until the 17th or 18th. A. That's correct.

123 Q. Now, did you do anything about it on the 14th, sir? A. We did.

Q. What did you do on the 14th? A. On the 14th, I didn't do anything. I don't remember exactly the date, if it is the 14th or 15th. We were not in violation of any rule and we can wait another day. The only thing we tried is to reach Guren to get the check in. Had we gotten the check in earlier from him, we would have been able to sell it at a higher price right away and wouldn't have caused that much loss to ourselves, but he was not available and he went away to Atlantic City to rest from this conniving deal, that's all, exactly, what I have to tell you.

MR. RYAN: May I have the time sheets, Exhibits 4 and 5?

BY MR. RYAN:

Q. I will ask if you will look at those and isn't it a fact, Mr. Guren did report for work on the 10th, 11th, 12th and 13th of August, Mr. Sade? A. The 10th, all right.

Q. The 11th? A. And 12th and 13th.

Q. Yes, sir. A. He didn't have to do a thing at that time; he didn't have to deposit the check.

124 Q. So, up to the 15th he hadn't -- A. We didn't have to get a check from him.

Q. Up to the 15th he hadn't been away out of town? A. I said no, Mr. Ryan. I am repeating. I said, after he felt that he has to turn in the check, because we will have to get a check from him, then he decided to leave town.

Q. On the 17th and 18th, by your exhibits, Plaintiffs' Exhibit No. 5, Mr. Guren is reported ill, isn't he, Mr. Sade, he is not reported out of town? A. I don't control what his father or mother would call the office --

THE COURT: Just answer the question.

BY MR. RYAN:

Q. Your order shows -- A. Whatever the record shows is correct.

Q. Then he was ill on those two dates, the 17th and 18th?

MR. WILSON: I object to that conclusion, Your Honor.

THE COURT: If the record shows that, he said whatever the record says is correct.

THE WITNESS: If somebody comes in and says he is sick, he is sick. We don't send an investigator to find out if he is sick or not.

125 THE COURT: It is marked ill on those two days.

BY MR. RYAN:

Q. Now, on the 19th, a date appears on Plaintiffs' Exhibit, the check, Plaintiffs' Exhibit 16. Do you know who inserted that 19 on that check for your company? A. I am assuming it is somebody in the cage, or Miss Mahon, whatever the case may be, or maybe Guren, himself.

Q. All right. And you promptly deposited this check to the credit of Sade & Company, and do you recall when it was that you first learned that this check had been dishonored, Mr. Sade? A. I think it was a Friday afternoon that the Security Bank called me on that, I don't remember the date.

Q. For your information -- May I get a calendar, if Your Honor please?

For your information, Mr. Sade, the check was deposited, presumably, on August 19th, 1959, which would have been Wednesday, and it is your recollection that you heard from your bank by Friday that the check was no good, which would have been, then, the 21st? A. I will tell you, on a Friday, I remember now, I called the Security Bank and I asked them, because I was suspicious as the stock was going down, and we didn't have the check. I called the Security Bank and asked them if they
126 could contact the bank in Maryland, I forget the name, the Suburban Trust, and he called me back that they do not have, he didn't tell me at that time that there was only about $100 or $200 in the account, but not sufficient funds; in other words, there is not much to worry about, even that they couldn't find out how much money he has, only on Monday that following we discovered the whole thing.

Q. And on August 21st, then, you knew or were advised that this check, Plaintiffs' Exhibit No. 16, was no good? A. Right.

Q. You thereafter contacted Mr. Guren? A. Right.

Q. And did Mr. Guren discuss the check with you, sir? A. I don't recall.

Q. Did you bring him into your office the following Monday and discuss this check with him and didn't he tell you that he had contacted the maker of the check and that he was advised funds would be put in to make the check good? A. Mr. Ryan, which Guren are you talking about?

Q. Mr. Thomas Guren, the man who worked for you, your employee. A. That is why I am asking you, which one it was.

Q. Yes, didn't he tell you that? A. He told me that it is impossible, you put back the check and it will be all right. It's impossible.
127 Q. It's impossible that the check is bad? A. It's impossible that the check is bad, just put it back and everything will be fine, he has got lots of money and his father was rich. That was the reply.

Q. All right. But you decided that you wouldn't put the check back and you never put the check back? A. I found out my own way that there

was no reason for it to go back and put the check in when he has only $200 in the bank against $61,000, that would look silly.

Q. *** On August 25, you received this check back from the bank with the notice of protest? A. Right.

* * * * * * *

BY MR. RYAN:

Q. Did you then call Mr. Sekuler? A. Yes, I did.

Q. Did you talk to Mr. Sekuler? A. No, his wife answered the phone.

Q. As a result of that phone call to Mrs. Sekuler, did Mr. Sekuler come in and personally talk to you on the 26th of August at your place of business? A. No; as a result of Mr. Guren, Guren kept strongly after
128 him, and the result of that was that he came into the office.

* * * * * * *

BY MR. RYAN:

Q. I am asking you now, and I think you can answer it, did he come in on the 26th day of August?

THE COURT: Are you talking about Mr. Sekuler?

THE WITNESS: He was in every day in the office.

BY MR. RYAN:

Q. Then I got to assume he was there on the 26th. On the 26th did he pay you some money? A. I don't know if it was the 26th, but he paid me $1900.

Q. I am trying to find out when you talked to him. A. The 26th or the 27th, it doesn't make any difference, he paid $1900.

Q. All right. He brought that in to you, Mr. Sekuler did, did he not? A. That is correct.

Q. And how was that, in check or cash? A. Cash.

* * * * * * *

129 BY MR. RYAN:

Q. What was the price of the stock, Mr. Sade, what was the bid and asked price on the 26th when Mr. Sekuler came in and paid you $1900?

A. I will have to look up the papers in order to give you an answer.

Q. In looking up the papers, would you refer to the National Quotation sheet which is Plaintiffs' Exhibit 37 in this case? A. What was it, August?

Q. What was bid and asked on August 26th. A. August 26th, 21-1/2 to 22, 100 shares bid and offered. 100 shares only, Mr. Ryan, that's all you could sell a day.

Q. That is what it reflects as sold that day; is that right?

MR. DERRICKSON: I am sorry, that is incorrect. I object, Your Honor.

130 MR. RYAN: You are saying the witness is answering incorrect?

THE COURT: He is giving the answers.

MR. DERRICKSON: I don't think it is proper for him to ask an improper question.

THE COURT: The question was answered by your witness, counsel. If you want to ask questions, you may in explanation.

BY MR. RYAN:

Q. Now, I show you Plaintiffs' Exhibit No. 19, which is a telegram dated August 26, 1959, addressed to Mr. Sekuler. A. Right.

Q. Your company sent that telegram and you have so testified. I will ask you this: Did Mr. Sekuler bring in the $1900 before or after you sent that telegram, sir? A. I don't recall that. It's too long a time for me, I just testify what I do remember and I don't want to make something which I don't remember. But I do know that this is a very important thing to send out a wire to a client otherwise we cannot go ahead and sell.

Q. Yes sir. You have told us, on your direct examination that whenever Mr. Sekuler came in with the $1900, whether it was before or after this telegram, he at no time rescinded his purchase or canceled his pur-

131 chase of the 2300 shares. A. That is correct.

Q. By the same token, he never authorized or directed you on September 1 to sell 400 shares at 23-1/4, or any other price, did he, Mr. Sade? A. On September 1?

Q. Yes, on September 1. A. No, he didn't.

Q. And he didn't tell you on September 3 to sell 100, 200 or any other number of shares of his stock, did he? A. We tried to test them out to see if we could even get rid of it.

Q. Did you not tell us, Mr. Sade, that your Exhibit No. 37, this sheet from the National Quotation Bureau, indicates the bid and asked prices for these shares in the several markets or several houses in which they are available? A. They indicate, it is only -- the over-the-counter brokers, it is a means of advertising to get you in to make bids, but they may say to you 22-1/2, 22-1/4, and 23-1/4 and you come in the next day and they will bid only 19 for your stock. It is only a means of getting you into a transaction. That is the way the over-the-counter is transacted.

132 Q. These particular shares were being sold between the interval of August 10 and September 3 in New York through various houses, were they not? A. About two or three houses.

Q. By J. F. Riley Company? A. Right.

Q. Vilas & Hickey, right? Yes, or no. A. I am not going to make any comments on these companies, but you couldn't even sell them a hundred shares.

Q. Were they being offered by these companies for sale? A. For sale?

Q. Yes. A. But not to buy.

Q. Did they have some that you could buy? A. They wanted to sell me, but they wouldn't buy from me. Everybody wanted to sell, but nobody wanted to buy.

Q. Were they also for sale at Gregory & Sons? A. To a limited extent.

Q. As a matter of fact, you bought from them? A. That's correct. Everybody was selling you but nobody would buy any back.

Q. And they were for sale in Boston and in Chicago? A. Yes.

133 Q. Did you offer these shares at any time in writing to any of these other securities dealers, Mr. Sade? A. In writing?

Q. Yes. A. Mr. Ryan, you don't do such things.

Q. Did you send them a wire that I have got some shares? A. You don't do that.

Q. No, I don't, I said, you didn't. A. No, nor does any broker in the country do that.

Q. Very good. Did you offer these shares at any time to any of your customers at any price? A. I offered them to my relatives to get me out of this situation, so I sold them at the offer side. We didn't want to sell.

Q. That transaction was with your relatives, you said, is that where you disposed of these shares? A. I can prove that to you.

Q. You sold to relatives? A. Couldn't sell them any other way. To my very close relatives. I wouldn't sell to you or any other client at that time.

Q. Mr. Sade, can you explain if these shares were not being marketed if there were no transactions in them, why the price would vary as much as a dollar, dollar and a half, two dollars, from day to day in this

134 particular security on the bid and asked, if it was not being traded actively? Do you have an answer for that? A. Would you repeat that question again?

Q. Yes, sir. My question is: Can you explain why it would be that if there is no market for this particular security, the bid price would vary as much as two dollars a day in the same house and the asked price would vary as much as two dollars a day from day to day in the same securities house, if there was no market for the stock, no sales? A. There are quite a few reasons for it.

Q. I have asked if you can give us one. A. All right. One is that it was a thin market. Two, naturally, brokers were interested in the stock and, three, stock is held by being concentrated in a few hands and

the public doesn't like that, either, so, therefore, the real investors are not in there and it's still a speculative stock. ***

* * * * * * *

135 BY MR. RYAN:

Q. *** Do you recall answering certain interrogatories served on you in this case? And, specifically, interrogatory No. 17 in which you were asked on what dates were offers made in the market for shares of the stock involved here in between the date when you were first aware of the purchaser's default and your final sale and what was the bid price on said date, and do you recall in answer to that interrogatory you indicated and stated that plaintiffs believe, plaintiffs being you and your partners, plaintiffs believe offers were made on all dates subsequent to the purchaser's default and prior to plaintiffs' final sale.

Now do you mean to say --

* * * * * * *

136 BY MR. RYAN:

The bid prices on these dates vary. Defendant's request may be partially answered by reference to the quotations for the stock contained in the Eastern Section of the National Daily Quotations Service, New York, New York, during the period in question. Plaintiffs do not presently have copies of these quotations which are equally available to defendant.

BY MR. RYAN:

Q. Do I understand your testimony, Mr. Sade, to be that there were not offers nor bids on each of these dates? A. No, Mr. Ryan, I don't think you understand the problem, I am sorry to say that, but I am in the brokers business and I would like to get some time to explain it.

Q. Do I understand your answer to your interrogatory is that a truthful and correct answer, or would you like to explain it? A. I would like to answer it.

* * * * * * *

137 BY MR. RYAN:

Now, Mr. Sade, 600 of these shares were sold on either the first and/or the first and third of September. Did you thereafter contact Mr. Guren and Mr. and Mrs. Guren, his father, that is, your employee's mother and father, to discuss this transaction or this entire series of transactions with them. A. We did.

Q. And did you bring them all into your office together to discuss this thing with them? A. Yes, we did.

Q. Did you tell them, Mr. Sade, that because of the fact that Mr. Guren had not, and when I say Mr. Guren, I mean your employee, because he had not checked the credit of Mr. Sekuler, the purchaser, that you were going to hold him personally responsible for any loss that occurred in this matter? A. Not correct.

* * * * * * *

BY MR. RYAN:

Q. How frequently did you talk to Mr. Guren, your employee, and
138 his parents about this matter? A. We talked very frequently, practically, it was a daily basis. They used to come into the office and try to influence that we should not sell the stock, we should hold it, they wanted to try to raise some money so they could take it over. They went so far as to see some people in New York to help them out so they could buy the securities and they could hold it so the son would not lose the job.

Q. Oh, you were going to discharge the boy? A. I was not going to discharge him. The only time I was going to discharge him was after I discovered it was collusion in there.

Q. You weren't going to discharge him at first, but you were going to keep him and let his parents take over this stock, were you? A. That's his business what he wants to do. I was not going to take the loss for introduction of a bad client.

Q. You were not going to take a loss for the introduction of a bad client, that was your position, wasn't it, Mr. Sade? A. Right.

Q. And in order not to take the loss for the introduction of a bad client, it was perfectly all right with you if ***

* * * * * * *

139 BY MR. RYAN:

Q. Mr. and Mrs. Guren, the parents of your employee, it was all right with you if they borrowed money in New York and would take over this transaction? A. What question is it? You ask me if I am a philanthropist, what do you ask me, Mr. Ryan? Explain it.

THE COURT: He simply is asking if it was agreeable with you that Mr. and Mrs. Guren, the parents of your employee, would try to arrange to take care of this and he would continue on in his employment.

THE WITNESS: It would have been agreeable until a certain date.

BY MR. RYAN:

Q. Well, until that date you got how much out of Mr. and Mrs. Guren, Senior, how much money?

MR. DERRICKSON: I object, Your Honor, to his characterization of you got how much, and he is badgering, too.

BY MR. RYAN:

Q. How much did Sade & Company get?

THE COURT: He may answer.

140 MR. DERRICKSON: It is all in the record.

MR. RYAN: They don't concede their liability on this amount, Your Honor.

THE COURT: Don't you concede it applies on this account?

MR. RYAN: No, they don't.

THE COURT: Do you concede it applies on this account?

MR. DERRICKSON: It applies, however, --

THE COURT: Just answer my question.

MR. DERRICKSON: No, sir.

THE COURT: Then he has a right to cross-examine as to that.

* * * * * * *

141 BY MR. RYAN:

Q. May I have what has already been marked Plaintiffs' Exhibit No. 32, but not in evidence, may I call on it, please?

Mr. Sade, just before the luncheon recess I was inquiring of you concerning some sum of money in excess of $4,000 which at some stage of these proceedings was obtained by your company from Mr. William J. and Ann W. Guren; do you recall that, sir, having been interrogated concerning that? A. I remember.

Q. Now, it is a fact that prior to these occasions, which are in suit, Mr. William J. Guren and Ann W. Guren, the parents of Thomas Guren, your employee, maintained a trading account with your brokerage house; is that right? A. I am assuming it is right.

Q. I show you what has been marked Plaintiffs' Exhibit No. 32 for
142 identification. Do you recognize this as the Guren, Sr., trading account? A. It is an account.

Q. I will ask you to look at the last item on the bottom of that page, it is dated September 23, 1959; is that right? A. Right.

Q. And does it show, Mr. Sade, a transfer of $4,571.13 out of William Guren's account? A. Correct.

Q. The original stated that was being transferred to the Stanley Sekuler account, didn't it? Isn't that what the original showed? A. The result was to the Stanley Sekuler account.

Q. Or was the result to S. Thomas Guren's account? I will ask you to look closely at Exhibit 32, in which you have in your hand.

MR. DERRICKSON: Your Honor, I don't know what question he is on.

BY MR. RYAN:

Q. Did this not show initially you were transferring the funds to Stanley Sekuler's account and isn't that crossed out and didn't you eventually transfer those funds to S. Thomas Guren's account? A. All right,
143 so what?

Q. I will draw you the so what, Mr. Sade.

Now, when that money went into S. Thomas Guren's account it went into his account in Plaintiffs' Exhibit 33, which is in evidence and was transferred from his parents' account on September 23 to Mr.

S. Thomas Guren's account; is that right? A. Right.

Q. Now Iwill refer you, Mr. Sade, to Plaintiffs' Exhibit No. 31, that is the Stanley Sekuler account; is that right? A. Right.

Q. On December 31, 1959, did you not arrange to give credit to the Stanley Sekuler account, this record of your company, for $4323.23? A. That's correct.

Q. And the source of that $4323.23 was from William, senior to S. Thomas Guren, from Thomas Guren to your company? A. It's not that complicated, we obeyed instructions and carried them out. Two letters are in evidence. You made an impression --

THE COURT: Mr, Witness, don't argue with counsel, just answer the questions. The Court will draw the conclusions that are necessary. The question now is simply whether it is not correct that this money in-
144 dicates that it was first deposited in the Sekuler account and then from Sekuler to Guren and then from Guren to your account.

THE WITNESS: It is carried correct and we carried out instructions; that's right.

BY MR. RYAN:

Q. During the period of time that this $4,323 in Thomas Guren's account, you charged Mr. Guren, your employee, $499.50 on a balance of borrowed money by Sade & Company; is that right? A. Every account is charged, every client is charged for a debit balance when it is outstanding.

Q. Mr. S. Thomas Guren wasn't your client, he was your employee. A. He charged, too. I, myself, am charged too.

* * * * * * *

145 BY MR. RYAN:

Q. Mr. Sade, you terminated, or your company terminated Mr. Guren's employment September 25, 1959, sent letters to the New York and American Stock Exchanges. Now, I will ask you this: Subsequent to that, and in October of 1959, did you have a conversation by calling into your office or meeting with in your office Mr. William J. Guren, to

discuss this $4,000-odd which had been then converted to the Sekuler account? A. There were no further discussions. We finally decided that this is a loss and it is paying part of the loss and that was it. They discussed it, I had nothing to discuss any further.

146 Q. You didn't tell Mr. Guren, call him into the office and in essence tell him this, Mr. Guren, we have got four thousand and some dollars from you, we have charged you with it. We have used it. We protected our capital because we needed the money at that time. We will give you this money back if we can get it from the bonding company; did you tell Mr. Guren, Sr., that? A. That is not correct.

Q. Did you tell Mr. Guren, Sr., not to tell the bonding company of this conversation because you did not want it to know what had gone on about the $4,000? A. That is positively not correct.

Q. This never took place? A. No.

Q. Okay. On October 27, 1959, did you have any meeting with Mr. William J. Guren at Sade & Company offices? A. The only meetings we had were always public and several people were present and --

THE COURT: Mr. Witness, you didn't listen to the question. Repeat the question and try just simply to answer the question.

BY MR. RYAN:

Q. The question was: Did you meet with Mr. William J. Guren in

147 your offices on October 27, 1959? A. I can't recall if it is October 27. I met every day with him, so how can you single out one day, October 27. It's two and a half years. I can't tell you October 27. I met with him daily.

Q. You mean to tell this Court and me you met with Mr. Guren, Sr., daily? A. Daily.

MR. RYAN: I have no further questions.

THE WITNESS: I am under oath and I say daily.

MR. RYAN: I understood you to say daily, and that is the reason I have no further questions.

* * * * * * *

149 BY MR. RYAN:

Q. My next question, Mr. Sade, interrogatory No. 27, propounded to you in preparation for this trial, asked this question: How was this transaction accounted for in your income tax returns?

150 Answer to Question No. 27: the transaction was accounted for as a loss on the partnership return for the year 1959. A. In the individual tax returns.

Q. The answer says that it was reported and accounted for --

MR. DERRICKSON: Your Honor, if I might clarify --

MR. RYAN: Just a moment. I think one question at a time should be gone over and I will get one answer at a time.

Answer No. 27: The transaction was accounted for as a loss on the partnership return for the year 1959.

I will ask you where, on the partnership return -- is this the only partnership return you filed? A. The only one we filed, yes.

Q. But there is no reference on it to this loss? A. The only way to answer your question is to say, you reported the final figure less income and that is all there was to it. Because it is an information, that's all it is.

THE COURT: What Mr. Ryan is asking you is that in your interrogatory you answered the question that the transaction accounted for a loss on the partnership return for the year 1959. What did you mean by that answer?

THE WITNESS: I mean by that answer a partnership return is not

151 reported to the U. S. Government.

THE COURT: That isn't what you said in your answer. You said in your answer that the loss was accounted for in the partnership return for 1959.

THE WITNESS: Each partner takes his part loss on his individual tax return.

THE COURT: Then you answered this question incorrectly?

THE WITNESS: That's correct.

THE COURT: You answered this question incorrectly in the interrogatory and this was not correct, then, was it?

THE WITNESS: That's right.

BY MR. RYAN:

Q. My next question to you, Mr. Witness, is: Interrogatory No. 31 directed to you was:

> "Has any partial recovery effected from any source been reported in your tax returns and if so, how?"

And your reply to that interrogatory was:

> "Partial recovery was effected from William J. and Ann W. Guren and S. Thomas Guren in the amount of $4,323.03, and such is reflected in tax returns."

I will ask you if you can show me in the tax returns where that
152 recovery is reflected. A. It is made out by the accountant, taken as a summary, losses and profits. Because we had about 5,000 or 10,000 losses and profits. So they summarize it and give it as one figure to the Government. But there is no details of that.

Q. And the $4,323.03 is not reflected in the tax returns?

THE COURT: Can you lump together and say losses were $4,323, is the Government satisfied with that?

THE WITNESS: Yes, because we have about 200 transactions, we have about -- we tried during the day --

THE COURT: Don't they check with you to determine what the specific --

THE WITNESS: They do check from time to time. We never had anything incorrect.

THE COURT: You don't specify or group the losses in one lump sum?

THE WITNESS: No, Your Honor.

THE COURT: You didn't listen to my question. You are getting so excited you even want to argue with me, now.

I said you group the losses in one sum, you don't mean that.

THE WITNESS: No, that's correct.

153 THE COURT: You mean yes?

THE WITNESS: Yes. You group losses in short-term and long-term and group profits in long-term and short-term and report two final figures, one offsets the other.

THE COURT: All right.

BY MR. RYAN:

Q. I want to ask you whether or not in 1959 you did offset your claimed loss in this case by crediting it with the sum of $4,323.03, which you recovered from Mr. and Mrs. Guren: A. We did.

* * * * * * *

157 REDIRECT EXAMINATION

BY MR. DERRICKSON:

* * * * * * *

Q. I further show you Plaintiffs' Exhibit No. 29 and ask you if it is the confirmation for 1700 shares of T. V. Management for the Sekuler account? A. That is correct.

MR. DERRICKSON: I offer these in evidence, Your Honor.

* * * * * * *

THE COURT: Received.

158

* * * * * * *

(Plaintiffs' Exhibit No. 29, Confirmation for 1700 shares of T.V. Management stock, was received in evidence.)

* * * * * * *

161 ABRAHAM SEKULER

called as a witness on behalf of the Plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DERRICKSON:

Q. Will you state your full name, sir? A. Abraham Sekuler.

* * * * * * *

162 Q. Do you have a son named Stanley Sekuler? A. Yes, sir.

* * * * * * *

164 Q. Do you know where he is now? A. No, sir.

* * * * * * *

165 JOHN H. SUTTON

called as a witness on behalf of the Plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DERRICKSON:

Q. Would you state your name, sir? A. John H. Sutton.

Q. And your employment is what, Mr. Sutton? A. Administrative Assistant, Suburban Trust Company, Hyattsville, Maryland.

Q. Was the Suburban Trust Company subpoenaed and are you here

166 today in response to a subpoena to bring records of the bank for Mr. Stanley Sekuler? A. I am.

* * * * * * *

167 THE COURT: Why don't you read into the record what is in the card? You don't even have to mark it, so that the bank can keep the original record.

MR. DERRICKSON: This appears to be the depositor's contract, it contains his name, it is marked as a special account, this gives his name, Stanley H. Sekuler, home address Manchester Road, phone number and occupation is listed as Giant.

THE COURT: Giant?

MR. DERRICKSON: Giant. Apparently it must mean the Giant Supermarket. This was dated November 1956 and his business address is listed as Flower Avenue. And it indicates the account was closed on February 21st, 1961.

THE WITNESS: That indicates his place of employment was the Giant, right across the street from our Flower Avenue office.

THE COURT: I see.

BY MR. DERRICKSON:

Q. So you say you have written on the card to indicate he worked at the Giant Supermarket? A. I presume so, it was handled by a clerk back in 1956.

168 Q. Plaintiffs' Exhbit No. 40 are the bank records of Stanley Sekuler from June 18, 1957 through March 7, 1960. The fourth page contains the account from July 13 to August 6, 1959. I show this to you, Mr. Sutton, and ask you what the balance was on August 10, 1959? A. $299.63.

THE COURT: What was that?

THE WITNESS: $299.63.

THE COURT: All right.

BY MR. DERRICKSON:

Q. In going through these accounts, before you came down here, did you have an opportunity to review the account? A. I looked at the sheets you have here, yes.

Q. At any time on there did you see any balance --

THE COURT: Don't they speak for themselves? I can see what they show.

MR. DERRICKSON: All right.

BY MR. DERRICKSON:

Q. Now, in the event a check was returned for insufficient funds, would it appear on this account? A. Yes, it would.

Q. Does it appear on these accounts? I have not seen it.

THE COURT: Are you referring to the particular check that we

169 are concerned about?

MR. DERRICKSON: I mean that check, I didn't refer to it.

THE COURT: There is no dispute it was returned marked insufficient funds.

* * * * * * *

CROSS-EXAMINATION

BY MR. RYAN:

Q. Mr. Sutton, you don't know Mr. Sekuler personally, do you? A. No, I do not.

Q. You do not know whether he had any accounts under any names or other business accounts? A. Under other names, not that I know of.

Q. Did he have any joint accounts with his wife? A. He had a loan with his wife.

Q. A loan on which his wife was co-maker? A. It doesn't say she was co-maker, it is in both names.

* * * * * * *

171 MR. DERRICKSON: I see here among the papers, Your Honor, only one other form which is an application for a loan bearing date March 10, 1959, indicating his position as grocery clerk and his length of service five years, salary $105 per week, March 10, 1959, signed by Stanley Sekuler, and I would like to introduce these further records.

THE COURT: You mean just for that purpose, just for the information which you have just stated?

MR. DERRICKSON: I thought I would not take this from their files.

THE COURT: No, no; I mean --

MR. DERRICKSON: This is a savings account and their loan account indicating no funds.

THE COURT: All right.

* * * * * * *

178 FRANCES MAHON

a plaintiff herein, was called as a witness on behalf of Plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DERRICKSON:

Q. Would you state your name, please? A. Frances Mahon.

Q. What is your occupation? A. Partner, Sade & Company.

* * * * * * *

BY MR. DERRICKSON:

Q. And what are your duties as a partner? A. I am in charge of the back office operation.

Q. The back office includes what? A. The receipt and delivery of money, checks, securities.

Q. I show you Plaintiffs' Exhibit 16, which purports to be a check dated August 19. Have you seen that check on a prior occasion, Miss Mahon? A. I have.

Q. When did you see that check the first time? A. On August
179 19th.

Q. And you recall that date because -- I am sorry. What was -- who was the check received from? A. I received the check from Thomas Guren, salesman in our office.

Q. And was the check in payment for any specified item? A. It was in payment for 2300 shares of T. V. Shares.

Q. When you received the check was it in blank or was it completed or filled out? A. It was not complete, it was signed.

Q. And who filled the check in? A. I did.

Q. And did you apprise Mr. Guren that you were going to fill it in? A. Oh, yes.

Q. And he asked you to fill it in? A. He did.

Q. Can you tell us why it wasn't filled in prior to the time it was given to you?

* * * * * * *

THE WITNESS: He didn't give me any explanation why it wasn't filled in, he merely asked me to fill it in.

180 BY MR. DERRICKSON:

Q. And you knew it was in payment for the Sekuler purchase?

A. That is correct.

Q. And you knew the date? A. Right.

Q. Now, the date of the purchase was August 10, according to the exhibit. When did you first -- is it your duty to receive payment for purchases of customers? A. Yes, it is.

Q. From the representatives? A. Yes, either that or directly from the customer.

Q. Or it may be mailed in? A. Yes.

Q. Now, did there come a time when you realized the payment for these securities was overdue or becoming overdue requiring action on your part? A. Well, naturally, this payment was due on the 14th, that was the payment day, and the minute that date passed, then we immediately checked with the salesman on where the payment was.

Q. Did you check with the salesman in this case? A. In this case he was not in the office on the day after the due date. He was not in the office on the due date because I was concerned even on that day.

181 THE COURT: You were concerned on the 14th and concerned on the 15th?

THE WITNESS: Right.

THE COURT: Why didn't you call up the bank and see if there was any money in the bank at that time?

THE WITNESS: I had no idea of the customer's bank.

THE COURT: You said you were concerned.

MR. DERRICKSON: Because the check --

THE WITNESS: Just for payment is all. We always follow up on settlement day to see who hasn't come in.

BY MR. DERRICKSON:

Q. So you were concerned -- A. We would follow up with the salesman on the following day which, in this case, would have been a weekend, it would have been on a Monday.

* * * * * * *

182 BY MR. DERRICKSON:

Q. Did you receive payment as a result of that inquiry? A. I received payment on the 19th.

Q. Did you call Mr. Guren again? A. Yes, I did, on the morning of the 19th.

Q. Had you called him before that time? A. Only through my request someone else called.

Q. I see. And Mr. Guren was called by you on the 19th? A. Yes, he was.

Q. And you stated payment should come on that date? A. Yes.

Q. Why was that the date, the final date for payment? A. Well, you have seven days after the trade, seven full business days, on that day if you haven't received payment you must get an extension from the National Association of Security Dealers.

Q. So that, he did, then, bring the check in and -- A. He did.

Q. And gave it to you? A. He did.

Q. And you testified you filled it in as to the amount of the charge of the Sekuler account? A. That is correct.

Q. At any time thereafter did you have any reason to question this
183 check? A. No -- thereafter?

Q. Yes. A. Not until, I believe it was, Friday of that week.

THE COURT: What date was that?

THE WITNESS: Well, that would be -- this was the 19th, it would be the 21st.

BY MR. DERRICKSON:

Q. And what was -- A. As I recall, it was the 21st, I received a call late in the afternoon from an officer of the Security Bank informing me that this check was being returned.

Q. Did he state the reason for it being returned? A. I assume he did, I am sure he did, I don't recall.

* * * * * * *

CROSS-EXAMINATION

BY MR. RYAN:

Q. Miss Mahon, you have told us that this account should be paid within four days after the order was placed; as a matter of fact, that is what your confirmation states? A. That is settlement.

Q. Settlement date is spelled out on the confirmation to the purchaser to be four days after purchase; is that it? A. Yes.

184 Q. Purchase date was August 10th and on your notifications to Mr. Sekuler it was spelled out settlement date was to be August 14th, 1959; is that right? A. That is correct.

Q. Who established the rule of settling on these purchases within four days, is that a house rule at Sade & Company? A. No, I think that is a regulation T.

Q. Isn't that the regulation passed by the Federal Reserve System and General Accounting Office? A. Right.

Q. Insofar as the Sekuler account was concerned, he was a new customer to Sade & Company, you didn't have an account with him before, or he with you? A. That is correct.

Q. This transaction for a new customer of $61,000 is a rather unusual new first customer, isn't it? A. It's a large amount.

Q. Yes. Now, Mr. Guren was at work on the 10th, 11th, 12th and 13th, wasn't he?

* * * * * * *

185 BY MR. RYAN:

Q. Do you know whether or not he was ill on the 14th and the following Monday and Tuesday? A. Yes, he was.

Q. Is that what he told you? A. That is right.

Q. Pardon? A. He told us when he called.

Q. You phoned him at home on the 19th when you reached him? A. And prior to that, as well.

Q. Prior to that as well? A. Yes.

Q. He has had frequent bouts of illness, hasn't he, Miss Mahon?

A. He missed some time from the office.

Q. What did he tell you about the Sekuler check, if anything, when you called him at home and inquired about it? A. On the 19th, when I talked with him?

Q. Yes.

THE COURT: Didn't you ask him about the check before the 19th?

THE WITNESS: That is correct.

THE COURT: What did he tell you when you first asked?

186 THE WITNESS: As I say, the bookkeeper called.

THE COURT: Pardon?

THE WITNESS: When I talked to him on the 19th he said he had the check in his pocket and would bring it in but he was ill and would rather not bring it in but I stressed the importance of his bringing it in and he did.

THE COURT: When you got information from the bookkeeper, I assume you got information from the bookkeeper that he had the check prior to the 19th?

THE WITNESS: I did know that he had the check.

THE COURT: What date was that, the 15th?

THE WITNESS: No, it would be -- I am sure that was on the Monday, that would have been --

BY MR. RYAN:

Q. The 10th was the date of the purchase and the 10th was a Monday -- would a calendar help you?

THE COURT: Why didn't you send someone out for the check?

THE WITNESS: If I was assured he was going to be in, you see, or I certainly would have made some arrangement.

THE COURT: When he didn't come in Monday why didn't you send someone out?

THE WITNESS: We again were assured he would be in the next day.

187 THE COURT: When he didn't come in the next day, why didn't you send someone?

THE WITNESS: That is when I called him and said you could have mailed it to me or have someone pick it up.

THE COURT: Go ahead.

BY MR. RYAN:

Q. Did he tell you the check was blank? A. No, he did not.

Q. The first time you knew the check was blank was when it was delivered to you by Mr. Guren? A. When he handed it to me.

Q. The 19th was the first time between the 10th, which was the purchase date and that date, the 19th, that you personally had been in touch with Mr. Guren? A. That I personally was, yes.

Q. He was in the office those earlier days during that week? You made no request of him during those days, that request, did you? A. No, I didn't follow up with him and wouldn't have until the 14th.

Q. Now, incidentally, are you the person who completed the rest of the check by inserting the typing in it about the Sade & Company and the amount? A. Yes, I did.

188 Q. How about the 19th, who put that in, do you recall? A. I did.

Q. That's your date also, that wasn't on there ahead of that? A.No.

Q. Now, incidentally, did Mr. Guren also have another check with him, for another one of his transactions, that he turned in on the 19th that he likewise carried around with him the six or seven days? A. I believe he did.

Q. For another customer? A. Yes.

Q. Does Sade & Company have any rule or regulation or practice concerning the sale of securities purchased for it by a customer such as this when payment is not made in accordance with the Regulation T that you speak of? A. Well, after a customer has been notified by a sell-out notice, and if he doesn't contact us or there is no contact, it may be sold.

Q. As a matter of fact, the regulation requires it to be sold, does it not? A. Well, I believe it says as soon as practicable.

Q. Doesn't it say that if within four days, I am talking now about the Federal Reserve regulation, if within four days the account of the
189 customer is not satisfied by payment or deposit of registered and paid for securities sufficient to meet the credit balance, then due and owing, that the account must be liquidated? A. I think that has to do with margin occasions, I don't believe it applies to an occasional transaction.

Q. You think that, you are not sure? A. I am relatively sure.

* * * * * * *

Q. What notice, if any, was given to Mr. Sekuler about disposition of his account? A. He was sent a sell-out notice on the 26th of August.

Q. And did you have occasion to see Mr. Sekuler on the 26th or thereafter? A. He was in our office on that day, I am sure.

Q. On the 26th? A. Yes.

Q. With money? A. Yes.

* * * * * * *

190 BY MR. RYAN:

Q. Your first notice of the refusal of payment of this check was a telephone call from your bank? A. From our bank.

Q. On August 21st? A. Yes. The actual check was not returned until the 25th, I believe.

191 Q. The 21st was a Friday? A. Right.

Q. And you did get notice on that day? A. Telephone notice.

* * * * * * *

REDIRECT EXAMINATION

BY MR. DERRICKSON:

Q. Prior to the time that this Television Shares Management stock was first offered on August 10, did you know that Thomas Guren had an order for the stock, a large order for the stock -- I'm sorry --

A. I knew that he planned to buy a number of shares of the stock.

Q. And did he state to your knowledge that it was for a wealthy client? A. That was what I understood, yes, he did. He did not discuss
192 this with me.

Q. And to your knowledge, Regulation T, as it applies to a special account which is a cash account, there is a seven-day period within which you must receive payment? A. Yes, that is correct.

Q. And in this case Mr. Sekuler's account was a special cash account; is that correct? A. It was a regular cash account.

Q. It was not a margin account? A. It was not a margin account.

Q. Therefore, the four days does not apply? A. The four days applies to settlement, of course, but you have three days in which to find out why they haven't been paid.

Q. How long have you been engaged in the brokerage business? A. 1951

Q. Approximately ten years.

* * * * * * *

193 ARTHUR C. BAILEY

called as a witness on behalf of the Plaintiffs and, having been first duly sowrn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DERRICKSON:

Q. Will you state your name, sir? A. Arthur C. Bailey.

Q. And your occupation? A. I am Claims Manager for National Surety Corporation, Firemen's Fund.

* * * * * * *

BY MR. DERRICKSON:

Q. Did you receive the claim from Sade & Company based upon the current action which you have heard the details of today regarding a loss in connection with Stanley Sekuler's purchase of T.V. Shares Fund? A. We received what is designated as a proof of claim.

194 Q. Was that rejected? The first claim, let's call it the first claim. A. Yes. The claim as submitted on September 11th was denied.

* * * * * * *

BY MR. DERRICKSON:

Q. The next notice in which claim was made, because of complicity of Guren and Sekuler -- correction --

Now, you were informed claim was being made because of complicity on the part of Guren with Sekuler; did you receive such a claim?

195 A. I received --

Q. Purported claim or alleged claim? A. I received a letter from you, Mr. Derrickson, I think it was directed to Mr. Russell, I believe, and transmitted to me by him. Simply alleging or stating a fact that you now believe there was collusion between an employee and someone else.

Q. And there was a sworn affidavit, was that claim rejected?

A. No, sir, I don't believe there was a sworn affidavit on that.

* * * * * * *

A. An affidavit was made by Leo Sade to the effect that he had certain information given him by Mrs. Sekuler, was transmitted to me. We considered, of course, the nature of the submission, it was no sworn affidavit of claim as such.

Q. No formal claim was submitted on your formal proof sheets?

A. That is correct, or charging so in the affidavit, yes, sir, none was submitted.

196 Q. I show you Plaintiffs' Exhibit 24 and ask you if this is what you have been discussing and if such was received by you? A. Yes.

* * * * * * *

BY MR. DERRICKSON:

Q. Were you notified of a meeting, a conference to be held before the -- one of the United States Attorneys for the District of Columbia in which Sade & Company filed a formal complaint alleging a bad check charge against Mr. Sekuler and conspiracy and false pretenses against Mr. Guren and Mr. Sekuler? A. I was notified of the conference to be held in one of the Assistant District Attorney's offices, I do not recall

197 whether or not a formal complaint was filed, but there was certainly some indication.

Q. Do you recall, was that in Mr. Maurice Dunie's office? A. Yes, sir.

Q. And can you recall the people who appeared at that conference? A. I was trying to recall that a little while ago, not all of them, Mr. Dunie, yourself, Mr. Sade, I was present, Mr. Heffter, is it, from Sade's office, Mr. Guren was present, Mr. Jaffe, attorney for one of the parties and I am not sure whether the attorney for the other party was present or not.

Q. Were Mr. and Mrs. Sekuler present? A. I believe so, Mr. Derrickson. There were a number of people there.

Q. And it was alleged to be an informal conference at which no one could take notes? A. That is correct.

Q. And Mr. Dunie questioned the various parties? A. Yes. I would prefer to say there was a general discussion, it wasn't exactly a questioning proceeding.

Q. Do you recall that any attorney advised their clients to rely upon the Fifth Amendment and not to give any answers to any questions by Mr. Dunie? A. No, Mr. Derrickson, I don't recall that. I wouldn't

198 say it happened.

Q. So, did they testify freely to the questions? Was it a fact-finding investigation, we might call it? A. There was quite a free exchange of ideas, yes.

* * * * * * *

199 BY MR. DERRICKSON:

Q. The reasons for the denial of the second alleged claim by Sade & Company were what? A. Yes, because we did not feel that there had been any evidence presented to us that supported the claim of employee dishonesty, and you will recall that that was also discussed at the meeting in the District Attorney's office.

Q. You mean the fact that you were rejecting it on that basis ?

A. The fact that the District Attorney said that he could find no basis for filing or continuing with the criminal complaint of fraud or collusion.

Q. At that point? A. Yes, sir.

Q. So that was the reason for the rejection, you had no basis for a finding of dishonesty, is that your answer? A. That was the reason for the rejection of the claim.

* * * * * * *

200 CROSS-EXAMINATION

BY MR. RYAN:

Q. Mr. Bailey, to your knowledge, was any criminal action ever taken or put into prosecution by the United States Attorney? A. Not to my knowledge. In fact, at the meeting the Assistant District Attorney indicated he found no grounds for such.

* * * * * * *

201 MR. DERRICKSON: We rest our case, Your Honor.

* * * * * * *

4 S. THOMAS GUREN

called as a witness on behalf of the Defendant, was duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. RYAN:

Q. Mr. Guren, will you state your name please, sir? A. Yes. It is S. Thomas Guren.

* * * * * * *

BY MR. RYAN:

Q. What is your present business or occupation, Mr. Guren?

A. General Finance.

Q. And are you employed privately or do you work for some concern? A. Privately, I'm hired on a fee basis.

* * * * * * *

BY MR. RYAN:

Q. Directing your attention, Mr. Guren, to August, 1959, by whom were you then employed and in what capacity? A. Sade and Company, here in Washington, as a registered representative.

5 Q. Briefly, what does a registered representative -- what kind of services are rendered by registered representatives? A. Also called customers' men, and they take and execute orders for the sale and purchase of securities.

Q. In August, 1959, how long had you been so employed by Sade and Company? A. A little over a year; about a year and one month.

* * * * * * *

BY MR. RYAN:

Q. What training, if any, were you given when you came to Sade and Company? A. Mostly observation of how things were done in a brokerage office.

Q. Was there any course of six weeks given you by either Mr. Sade or any of the other partners in the nature of instructions by virtue of which you were indoctrinated into this field of work? A. Did you say

a course of six weeks?

Q. Yes; some six weeks of training. A. No, sir; there was a thirty-day period before I was allowed to take a test from the National Association
6 of Security Dealers and another five-month period before I could take a test from the New York Stock Exchange, but no formal six weeks' course of training or any other. There was observation.

Q. As a result of this observation did you take these tests? A. Yes, sir; I did.

Q. Were you accepted as a representative in each exchange? A. The National Association of Securities Dealers is not an exchange, it's a private organization made up of members of the brokerage communities. I was accepted by them through their test and also informed I passed the test on the New York Stock Exchange, which allowed me to buy and sell securities through the member firm through whom I worked.

Q. Now then, Mr. Guren, there came a time in August, 1959, when on behalf of Mr. Stanley Sekuler a certain order was placed. Are you familiar with that transaction? A. Yes, sir; I am.

Q. Will you tell us, first of all, you knew Mr. Stanley Sekuler? A. For many years; yes, sir.

Q. And how did the transaction originate, if you can explain that, sir?
7 A. Well, I'm not sure what you mean, how it originated.

Q. When did there come a time when Mr. Sekuler had some business that came into focus with you, sir? A. Since I had been in the brokerage business I had discussed various aspects of it with Mr. Sekuler from time to time. I had discussed a certain group of securities prior to August 10, 1959, with Mr. Sekuler and sometime before that, probably a week or ten days, Mr. Sekuler said that he wanted to buy some of those securities, and he indicated a rather large amount.

Subsequently he assured me that he had enough money in the bank to effect the purchase, gave me a check and told me to go ahead and buy securities up to a particular amount, which I did. I exercised my best judgment.

Q. Was a specific issue discussed as to what the stock would be that

was under consideration between Mr. Sekuler and as being discussed with you? A. Yes. It wasn't under consideration as such. I had mentioned in passing an issue called Television Shares Management or Television Management Shares -- I have never been exactly sure of that name -- which was due to come out sometime in August. I had discussed this as one of the group of such stocks of similar nature which had already come out to the public previously.

Q. And in your discussion with Mr. Sekuler you stated that the

8 conversation centered around some large amount that he wished to invest. How much money are we talking about? A. Mr. Sekuler indicated that he wanted to purchase up to $100,000 worth of the securities of the common stock of this company.

Q. And thereupon this stock came out on August 10, 1959, did it? A. Right.

Q. Who was handling it? A. Who was the underwriter?

Q. Yes. A. I don't remember. I think Bernard Gregory and Sons was one of the co-underwriters, but I don't know who the management underwriter was. I don't remember who it was.

Q. With this commitment from Mr. Sekuler, did you place an order to acquire some of these shares? A. Yes, sir; I did.

Q. With whom was the order placed for acquisition? A. The firm through which I worked, Sade and Company.

Q. All right. How many shares were purchased or ordered? A. August 10, 1,300 shares; August 11, a thousand more.

* * * * * * *

9 Q. The shares would be acquired in what way? By that I mean in street form? A. That I don't know. It's possible they could have been in street form or registered in Mr. Sekuler's name, I don't know how. Either one of these methods is usable.

* * * * * * *

10 BY MR. RYAN:

Q. What would it mean if this order was placed by Sade and

Company, to Gregory, with instructions street form and hold? A. If the order was placed street form and hold, it would mean that the certificate should be delivered to Sade and Company in street form and that Sade and Company would hold the certificate in their safe.

Q. All right. Now you ordered 1,300 shares or placed the order for 1,300 shares on August 10? A. Right.

Q. And 1,000 shares August 11, the following day? A. Right.

Q. Was there any reason why the entire 2,300 shares were not ordered August 10th? A. Yes. The stock came out at original issue price I think at $26 a share, but I can't remember that either. I bought the first 1,300 shares at $26.50 a share and then watched the market and then had a conversation with Mr. Sekuler later on, and told him I did not like the way the market was behaving and he should not buy any more.

I had a subsequent conversation with him and indicated again he should buy no more, at which time he said buy more anyway. So I bought another 1,000 at $26.25. I had another conversation with him and told him I wouldn't buy him any more stock because I didn't like the way the market was behaving. This is why it was not done all at once.

11 Q. What arrangements, if any, had you made with Mr. Sekuler for Mr. Sekuler's payment of these shares? A. He brought in a check Monday morning, August 10th, undated -- I think it was undated, and it was signed and otherwise blank, with instructions that when he received his confirmation the check would be filled out for the proper amount.

Q. All right. The check was delivered to you on August 10th, in the morning? A. Yes.

Q. That was before any shares had been ordered for Mr. Sekuler's account? A. That's correct.

* * * * * * *

BY MR. RYAN:

Q. And when delivered to you, it bore neither the date nor the amount, merely August, and the signature of Mr. Stanley Sekuler? A. I

know it bore his signature. I don't remember if it bore the date or not. I know it bore no other items, no amounts.

12 Q. It certainly wasn't dated August 19th when it was handed to you on August 10th? A. No.

Q. You are not mistaken about the fact that you did receive it August 10? A. I'm positive I received it August 10.

Q. Now upon acquiring these shares, 2,300 shares, do you know to your own knowledge that confirmation of those purchases of Sekuler were sent him? A. Not at that time, no. I never received my copy of the confirmations until later either.

Q. When did you receive your copies? A. I was out of the office on Friday of that week due to an illness. Up to that time I had not received my copies of the confirmation.

Q. Friday of that week was August 15th? A. I believe so.

Q. You were at the office on each of the other days earlier that week? A. Yes, but I think I also left early on Thursday.

* * * * * * *

BY MR. RYAN:

Q. Assuming that you were not there on Friday the 15th, when did

13 you next return? A. Wednesday, the nineteenth.

Q. In the interval between Friday the fifteenth and Wednesday, the nineteenth, to your knowledge had confirmations of Mr. Sekuler's purchase been issued? A. To my knowledge then or to my knowledge now?

Q. To your knowledge then. A. No, I didn't know that until Wednesday the nineteenth.

Q. To your knowledge now, do you know that they had been dated or sent out? A. I think so. I don't know for a fact. I don't know when he received them.

Q. Up to the nineteenth you had no personal relaying to you of any confirmation of this? A. That's right. I had no confirmations either.

Q. Had anyone from Sade and Company, between August 10 and

August 19, said anything to you, called on you or made any request for the delivery to them of payment in this matter? A. Between August 10 and August 19?

Q. Yes. A. No, sir. On August 19 Miss Mahon called me up at my house, Miss Frances Mahon, called me at my house around 11:00 or 11:15 in the morning.

Q. Specifically I will ask you whether or not any telephone operator or any other clerk of Sade and Company called you between the tenth and

14 nineteenth of August concerning this check? A. No, only Miss Mahon, she called me on the nineteenth between 11:00 and 11:30, I don't remember the exact hour.

Q. Specifically, what did Miss Mahon say to you? A. She said you have a couple overdue checks. I had another one in my wallet at the same time. She said, "You have a couple overdue checks. Can you get them down here?" I said, "Yes." I brought them down. I got to the office around 1:00 or 1:15 that same day.

Q. What disposition did you make of the check in this case, Plaintiff's Exhibit No. 16, the Sekuler check? A. I delivered it to Miss Mahon and told her to fill it out, asked her to fill it out on the typewriter.

* * * * * * *

15 BY MR. RYAN:

Q. And you did tell the office you were going away for a vacation? A. Yes, to Atlantic City for a few days.

Q. Did you in fact do that? A. Oh, yes, I went with my mother and daughter.

Q. When did you next return to the office? A. The following Monday which would have been the 21st, I believe.

Q. What if anything did you -- A. Excuse me; that would have been the 24th.

Q. Yes, the 24th. What, if anything, did you learn had happened in the meantime? A. I returned to my home around 5:00 p.m. on the 24th, which was a Monday. My father was waiting for me at that time and

informed me Mr. Sade called them and said Sekuler's check had bounced. I then called Mr. Sade at which time he said it was too late for me to come to the office then, would I come in the morning. I said naturally, and I was in the next morning.

Q. So the next morning would be the 25th? A. The 25th.

Q. Tuesday? A. Tuesday.

Q. You reported to the office? A. Yes.

16 Q. And Mr. Sade again, I presume, told you that the check had bounced? A. Right.

Q. Did he tell you of anything he had done -- first of all, did he tell you when he found out it had bounced? A. Yes, he told me he found out it bounced on the 20th, and got it back from the bank on the 21st.

Q. What did he tell you, if anything, he had then done? A. Yes, he said he had contacted Sekuler. Sekuler had told him that it was some sort of a mistake and said to redeposit the check, at which time it bounced the second time.

Q. Did you have further conversation then with Mr. Sekuler yourself? A. Sekuler came into the office; certainly I had conversation.

* * * * * * *

BY MR. RYAN:

Q. Do you recall then that Mr. Sade and Mr. Sekuler had some arrangements whereby Mr. Sekuler made some payment on this account? A. Yes. Mr. Sade told Mr. Sekuler in my presence that if Mr. Sekuler would come up with between $6,000 and $8,000, Mr. Sade would see to it

17 that this would be the basis for a loan and that Sekuler could then buy the stock outright with this money as the basis for a loan that Sade would arrange. Sade subsequently told me subsequently the same story.

Q. Prior to this conversation, what type of transaction had this been insofar as the orders? A. I'm sorry, I didn't understand that question.

Q. Prior to the time when these arrangements were considered -- A. Yes.

Q. . . . for making a loan out of this set-up -- A. Yes.

Q. . . . what had the transaction been in brokerage parlance, a margin, cash, regular account? A. I believe the order was given as a general cash transaction which was supposed to have been settled in four business days.

Q. And in the absence of being settled in four business days, what were the rights of the purchaser and the duties of the broker? A. The purchaser, under the Federal Reserve Board Regulation T, is supposed to settle his account within seven business days to the broker on over the counter stock, and at the end of that time if settlement has not been made, I believe it is the broker's obligation -- I'm not sure of this, but I believe
18 it's the broker's obligation to liquidate the transaction.

Q. Had you as an employee of Sade and Company ever been given such instructions that that would be the practice that would be followed in the event payment was not made for purchases? A. No, I never learned this while I was at Sade and Company, I learned this subsequently.

Q. Now, coming again to the 25th or the 26th of August, when Mr. Sekuler came in to talk to Mr. Sade, were these conversations carried on between Mr. Sade and Mr. Sekuler or were they carried on between Mr. Sekuler through you to Mr. Sade? A. Not through me at all. Mr. Sade talked with Mr. Sekuler privately. I also talked with Mr. Sekuler privately. I talked with Mr. Sade privately, and the three of us also had conversations together.

Q. Now about the time of these conversations, did Mr. Sekuler come up with any cash? A. Yes, sir, it was around that time, but I forget the exact day Mr. Sekuler came in with $1,900 in cash, as -- I forget what for -- I think to liquidate the loss on the stock which it was at that time, but he gave Mr. Sade $1,900 in cash.

* * * * * * *

19 BY MR. RYAN:

Q. Did you, as a registered representative, have any obligation or any duty to perform; was it your job to give any such notice to a customer?

A. Yes, if payment was late and I knew about it. I was obliged to see to it payment was made on time if I knew it was going to be late.

Q. Did you in this case give notice to Mr. Sekuler yourself of the delinquency? A. Yes, when I found out the check had come back because of insufficient funds I called Mr. Sekuler and asked him what had happened.

Q. And did you relay that information back to Mr. Sade? A. Oh, yes.

Q. Did you keep Mr. Sade fully advised as to any and all matters involved in this transaction which came to your attention through your conversations with Mr. Sekuler? A. Yes, I did.

Q. Now, did there come a time, Mr. Guren, when some disposition
20 was made by Sade and Company of some of these shares of Sekuler's stock? A. Yes, sir. I believe that Mr. Sade instructed 600 shares of this stock to be sold a day or two --

MR. WILSON: I object to "he believes," your Honor.

THE COURT: Well, unless he knows --

MR. RYAN: Well, it's of record, 600 shares were sold.

THE COURT: I think it is of record anyway.

THE WITNESS: All right, sir. Mr. Sade informed me a day or two after he received the $1,900 from Mr. Sekuler he was liquidating 600 shares of it, which the $1,900 represented the approximate loss on 600 shares at that time.

BY MR. RYAN:

Q. Did he indicate to you what disposition he planned to make of the remaining shares which would have then been 1700? A. Mr. Sade indicated many dispositions to me of the securities in question, at that time, and subsequently. He stated to me that if Mr. Sekuler did not come up with the money that he would be forced to prosecute him before the District Attorney, Sade would be forced to prosecute Sekuler before the District Attorney. He stated that if Sekuler would come up with between $6,000 and $8,000, Sade would arrange for a loan for the balance so Sekuler could keep all the shares.

21 He stated to me and my parents if we would come up with between $6,000 and $8,000 he would arrange for us to buy all the shares. He stated as a registered representative for his company I was responsible for the loss in the Sekuler account, if any.

When I first learned the check bounced I asked Mr. Sade in the presence of Mr. Phil Reilly to sell the stock, and I used the words friend or no friend, we can't take the risk. Sade refused to sell the stock at that point.

Q. Can you fix the approximate date upon which you stated to Mr. Sade sell this stock friend or no friend? A. Yes, Tuesday morning, August 25th, the first time I had a chance to talk to him in person.

Q. What if anything did Mr. Sade say about selling the stock? A. He said -- he said we have to give 48 hours, or some such number, to Mr. Sekuler, in writing, He said, besides, this stock will come back and we'll make a profit out of it.

Q. Do you know of your own knowledge any arrangements which were made pursuant to any of these plans which Mr. Sade discussed as possible ways of working out this problem? A. Yes. Mr. Sade convinced my mother and father to place certain funds of theirs in my account, which account would be turned over to Sade and Company, according to what Sade said, as the basis for a loan to purchase the remaining securities. This
22 was on September first or second.

Q. Did you know at that time that Sade and Company had paid for these securities? A. No, sir; I did not.

Q. You did not? A. I did not.

Q. Did your mother and father, pursuant to that suggestion, permit the arrangements to be made? A. Yes, sir. They turned their funds over to my account.

Q. And about what date was that? A. September first, I believe.

Q. And coincidentally with that, was any request made of you of any documentation, anything in writing? A. Yes. Mr. Sade asked me to sign a document turning over the funds in my account which then included my parents' funds to Sade and Company, against the loss in the Sekuler account.

He said that this was a technicality, that he would see to it that we would lose no money, that he would arrange for a loan in New York so we could purchase the stock using the loan as the balance of the payment.

I originally at that time demurred, I didn't like the idea, and he then said if I didn't sign the paper I would be fired. I was frightened so I signed the paper.

* * * * * * *

23 BY MR. RYAN:

Q. Were you fired on September 25th? A. I think it was the 25th or 29th; within the next thirty days, after that.

Q. Incidentally, it was about $4,500 or $4,600 that came out of your mother's account? A. Out of my parents' account; about $4,600.

Q. Do you know of any transaction later involving that fund and specifically I refer to a meeting around October the 27th, 1959? A. Yes, sir. On October 27, 1959 my parents had a meeting with Leo Sade and subsequent to that meeting in Leo Sade's office in the Moreschi Building, they went in and I waited in the car outside on 16th Street, it must have been about 4:30 in the afternoon.

Because of certain things my parents told me at that time, I later
24 called Leo Sade that same night at his home, at which time Leo Sade told me not to mention to the bonding company that there was any money in that account because he expected the bonding company to pay the loss within two or three weeks, and as soon as they did, we would get our money back.

Q. And did he confirm to you that he had made that same proposal to your mother and father that afternoon? A. Yes. He also said," I told them not to say that it came to me," referring to the statement to my parents.

Q. *** Did there come a time after that when you were requested to appear at the District Attorney's Office? A. Yes, sir.

* * * * * * *

Q. Before what Assistant District Attorney did you appear?

A. Maurice Dunie.

* * * * * * *

25 BY MR. RYAN:

Q. Mr. Guren, do you recall who was present in Mr. Dunie's office? A. Yes. Mr. Leo Sade, Mr. Myron Heffter, who was a partner in Sade and Company, Maurice Dunie, who was the Assistant U. S. Attorney at that time, myself, Mr. Stan Sekuler, Mr. Sekuler's attorney, Mr. Joe Sitnick, and my own attorney, Mr. Sam Jaffee, and I believe Mr. Bailey from the bonding company, from your company, sir.

Q. And at that meeting were these matters discussed which are here before this Court? A. Yes, sir, they were.

Q. Were any charges lodged against you as a result of that?

26 A. No, sir; there were not.

Q. Were any charges lodged against Mr. Sekuler as a result of that? A. Not to my knowledge.

* * * * * * *

BY MR. RYAN:

Q. May I show you Plaintiff's Exhibit No. 37, and I will ask you if you recognize that as being a compilation such as is issued by the National Quotation Bureau? A. Yes. This is the form that the National Quotation Bureau uses. This is their basic form. ***

* * * * * * *

27 Q. Assuming this purports to cover Television Shares Management Corporation common from August 10, 1959 to December 31, 1959 -- A. Yes.

Q. . . . in your experience in the securities trade, would this reflect to you there were on each business day -- A. Yes.

Q. . . . available shares of stock of Television Shares Management Corporation which could be sold if offered for sale and purchased if so offered? A. Yes. This indicates that there were purchasers and sellers of this stock on every business day that I see here.

Q. And assuming that, for example, to pick a date, on August 25th, 1959, Mr. Guren, J. F. Reilley and Company, Inc., of New York is reflected as having a bid of 23-1/8? A. Right.

Q. And asked 23-1/2? A. Right.

Q. What would that mean to you as a securities salesman? A. This
28 would indicate to me you could sell to J. F. Reilley 100 or more shares at 23-1/8 or buy from him 100 or more shares at 23-1/2/

Q. Why do you use the term 100 or more shares? A. This doesn't indicate the amount of shares J. F. Reilley is interested in buying or selling. However, the standard trading unit is 100 shares. It would indicate a minimum, possibly more. You would have to ask them either by telephone or teletype.

Q. Assuming on that same date May Gannon, Inc. has the figure 100 prefixed to 23-1/4 bid and 100 prefixed before the asked of 23-1/2. A. This would indicate to me they would sell or buy no more than 100 shares at those prices.

* * * * * * *

29 BY MR. RYAN:

Q. Is there any indication from these figures from the National Quotation Bureau that if diligently offered and pushed a little bit, that this stock couldn't have been sold somewhere between August the 14th, 1959 and September first, or second, or third, 1959?

MR. DERRICKSON: Objection, Your Honor.

THE COURT: Overruled.

BY MR. RYAN:

Q. Was there a market for it during those dates? A. Yes, sir; definitely.

Q. Mr. Guren, was the four-thousand-some-odd-dollars which was funnelled to your account from your mother's and father's account ever repaid to them? A. No, sir.

Q. Sade and Company still has it as far as you know? A. As far
30 as we know, they still have it.

Q. And so far as the $1,900 obtained from Stanley Sekuler, presumably they used that and applied it on his account; you don't know if that had ever been returned? A. I don't know if that's ever been returned, and I don't know how they applied it.

Q. Did you at any time ever have any arrangements with Mr. Sekuler concerning any sharing of profits in this transaction? A. No, sir.

Q. Upon what basis, if any, would you have been paid had the transaction been consumated as it was set up to be? A. On a commission basis by Sade and Company.

Q. Did you receive your commission on this? A. No, sir, I never did.

* * * * * * *

34 CROSS - EXAMINATION

BY MR. DERRICKSON:

* * * * *

37 Q. What was Mr. Sekuler's occupation? A. When sir?

Q. 1959 August? A. I believe he was working for a microfilm company at that time.

Q. Do you know how long he had been so engaged? A. No, I do not.

Q. Do you know what his occupation was? A. I think he sold microfilm to Government accounts -- microfilm and related products.

Q. Did he so state to you that was his profession or occupation? A. I don't know if he stated it directly but this was what I was lead to believe. I don't know whether he told me or not. It was a matter of general discussion.

* * * * * * *

38 BY MR. DERRICKSON:

Q. When did you see Mr. Sekuler the last time prior to August 10, 1959? A. I saw Mr. Sekuler or talked to Mr. Sekuler several times during the week immediately preceding August 10, 1959. On which day I saw him or talked over the phone I do not recall. It could have been the previous day.

Q. When you saw him do you recall who was in your presence, if there was anyone in your presence? A. Well he said he saw me at my office sometimes so it could have been whoever was in Sade & Company's office at the time.

* * * * * * *

40 BY MR. DERRICKSON:

Q. When did you first speak to Mr. Sekuler relative to the purchase of television shares of stock? A. Some time prior to August 10th, maybe a week or two weeks. Maybe even a month.

Q. And can you tell us how that discussion was initiated? A. I had discussed with Mr. Sekuler off and on over the period of the previous years since I had been in the brokerage business, the market and the general securities in general and sometimes specific issues or specific groups of issues. This was one of a specific group of issues which I had discussed with him from time to time.

Q. What specific group of issues was that? A. Management companies of mutual funds.

41 Q. Why did you discuss those particular issues? A. Those were the ones I had been familiar with or come across. To my knowledge they had all appreciated in price over a period of the past year or eighteen months.

Q. In other words, did you expect this television shares to appreciate too? Is that what you are saying? A. I don't say that I expected it to. I thought it was a sound investment at the time.

Q. Did you consider it a long range investment or a short range investment? A. I considered it both long and short range. Some people like to invest their money on a short time basis and some on a long range basis.

Q. Well, what was this investment to be, a short term or long term? A. Which investment?

Q. Mr. Sekuler's? A. Mr. Sekuler was told by me that anybody who put their money into this stock and willing to hold on to it, I thought would make a profit.

Q. Was it a short term or long term? A. You will have to ask Mr. Sekuler that.

Q. In other words, you stated that people investing for a short term or long term, and that you discussed it with Mr. Sekuler, but you don't know whether his personal finances required a short term or long term investment? A. It may not have been a matter of requirement but a

42 matter of personal desires.

Q. Do you know what he desired? A. Desires change from time to time. It is impossible for me as a broker to state to my client that this must either be or must not be a long term or short term investment.

Q. My question is to you, is whether you know whether his intention was a long term or short term? A. No, as I said I didn't know what his intention was, whether it was to be a short term or long term.

Q. Did you know Mr. Sekuler's financial status just prior to that purchase? A. Yes, somewhat.

Q. And what did you know of his status? A. I knew he had a $100,000.00 deposited for him in the bank.

Q. How did you know that? A. He told me that.

Q. Where did he tell you that? A. He told me the day before the stock purchase.

Q. Was it on Sunday, August 9th? A. Yes, on Sunday night or either Monday morning, August 10th.

Q. You don't recall which day it was? A. It was either Sunday night or Monday morning before the purchase of the stock.

43 Q. Do you know what Mr. Sekuler's income was at that time? A. Only vaguely.

Q. Vaguely, what would you say? A. I couldn't even guess.

* * * * * * *

Q. Did you know whether the $100,000.00 which was alleged to be on deposit were Mr. Sekuler's funds? A. Did I know if they were Mr. Sekuler's funds?

Q. Yes. A. No, he told me he had been making arrangements

with certain out-of-town parties.

Q. When did he tell you that? A. A good week before or 10 days before the purchase of the stock. Maybe two weeks before.

Q. Where were you when he told you that? A. I don't remember whether I was in my office or in my home.

Q. He told you he had $100,000.00 on deposit to his account at that time? A. No, sir, he told me that money was coming into the bank. This was ten days or two weeks before the purchase.

Q. I see. Had he arranged to get the $100,000.00 or was it $10,000.00.

44 Do you recall? A. It was $100,000.00. I never said $10,000.00, sir.

Q. Now, I am asking you, did he at one time earlier in the game tell you that there was $10,000.00 deposited in his account? A. No, sir, not to my recollection.

Q. So that approximately two weeks before the purchase he had advised you he had arranged to borrow a $100,000.00? A. To have $100,000.00 to put into his account. I do not know if he was borrowing it or not.

Q. Do you know from whom he intended to obtain the funds? A. He told me a certain executive of the Sun Ray Drug Company in Philadelphia.

Q. Did he state who they were by name? A. I don't believe he did.

Q. Do you know who they were? Do you know who those executives were by names? A. I know now who one of them was, yes.

Q. Did you know that on August 10th? A. No, sir, I don't think I did. I don't recall when I learned that executive's name. I don't remember.

Q. Now on August 10th you stated you didn't know what Mr. Sekuler's financial status was except in a vague way? A. That is correct.

Q. Did you know if he owned a home? A. On August 10, 1959, I

45 don't think he did.

Q. Did you know that he had been employed as a clerk in a Giant Grocery Store? A. I knew that he had been, yes.

Q. As early as 1956 or as late as 1959 that he was so employed? A. In 1959?

Q. Yes? A. I don't think so.

Q. So on August 9th or on August 10th, he told you that he had $100,000.00 on deposit in his checking account? A. That's correct.

Q. So you discussed the purchase with him the week prior to August 10 and then on or about August 10th or the week before August 10th he said that he had the $100,000.00 on deposit? A. That's right.

Q. And did he give you a check at that time? A. He gave me a check on August 10th.

Q. Where was that? A. In Sade & Company's office.

Q. And what did he tell you when he gave you the check? A. He said this check is good up to a $100,000.00.

Q. Did he state for what purpose you were to use the check? A. Yes, for the purpose of purchasing television management shares of stock.

* * * * *

46 BY MR. DERRICKSON:

Q. Why wasn't the whole $100,000.00 used to purchase stock? A. Because he told me to use my best judgment in the discussion as to the amount of purchase and the time of purchase.

47 Q. Were you told to fill in the check? A. No, sir, I was not.

Q. What were you told to do with the check? A. I was told to have the check filled in upon the receipt of the confirmations by Mr. Sekuler.

Q. So that he would call you when he received the confirmations and tell you to fill it in or have it filled in? A. That's right.

Q. Why didn't you put the check in on August 10th? Deliver it to the cashier? A. Because he had not received his confirmations.

Q. For what reason did he want to wait until he received his confirmations? A. I don't know, sir. It was his right to wait until he received them.

Q. Well, why did he give you the check on the 10th if he wanted to wait until the confirmations? A. Because I told him I couldn't take any sizeable order without a check in my hand.

Q. Why did you tell him that? A. That was the practice of Sade & Company.

Q. To receive the check first? A. That's right.

Q. So that you received the check and it was known to Sade & Company that you had the check on August 10th? A. I think so, yes.

48 Q. And you obtained the check so that they would know that you had obtained the deposit prior to placing the order? A. I think so.

Q. You received the check so Sade & Company would know that you had adhered to their rules to obtain a check before you placed an order? A. Yes.

Q. And you obtained it in blank? A. Except for signature. It was signed.

Q. And why was it in blank? A. Because the price and the amounts were not known at that time. This was prior to the purchase of the stock.

Q. And when were the amounts known? A. The amounts -- the numbers of shares bought and the price per share were known on the 10th and the 11th.

Q. Why were they not all known on the 10th? A. Because one order was put through on the 10th and one on the 11th.

Q. In any event based on your testimony all of the amounts known were known on the 11th? A. That's right.

Q. And the check could have been filled out on that date? A. No, sir, it could not. The commissions were not computed and Mr. Sekuler had not received his confirmations.

49 Q. In other words, you are stating that before that check could be paid that the commissions would have to be deducted from the check? A. No, sir, not at all.

Q. What are you saying? A. I am saying that the commissions have not been computed.

Q. What difference would that make? A. About $700.00.

Q. Well wasn't he paying commission? A. Well sure he was paying commission.

Q. Well wasn't that to be included in his check? A. Yes, sir.

Q. Wasn't that eventually included in the check that he put in? A. Yes, sir.

Q. Well what difference would it make then if the commissions weren't computed on November 11th? A. Well, sir, it couldn't possibly be accurate unless the commissions were included. The amount couldn't possibly be correct.

Q. How much were the commissions? I am sorry. What was the commission base? What percentage? Was it a normal exchange stock commission? A. Yes, it was a straight stock exchange commission for agency trade.

Q. So the exact percentage of commission was known on the 11th and the price was known on the 11th? A. The exact percentage of com-
50 mission had to be computed. It is on a sliding scale.

Q. I see. A. It comes to a little better than one per cent on a situation such as that.

Q. It would take a few minutes to compute that calculation, would it not? A. Apparently it was not done.

Q. So your testimony is the purchases were made on the 10th and 11th of August? A. That is right.

Q. I draw your attention to Plaintiff's Exhibits 14 and 15 and I ask you what they are? A. These are apparently carbon copies of two confirmations.

Q. To Mr. Stanley Sekuler or Sekuler? A. To Mr. Sekuler for the purchase of a total of 2300 shares of television shares of management, that is correct.

Q. What is there date? A. Both of these are dated 8-10-59.

Q. And on that date in the normal course of business would they have been sent to Stanley Sekuler through the mail? A. They should have been.

* * * * * * *

52 BY MR. DERRICKSON:

Q. May I ask you then: This is Plaintiff's Exhibit 12 indicating a buy order for 1000 shares. Can you tell me when that order was executed?

And I call your attention to the time stamp on the back thereof and ask
53 you if the purchase for that 1000 shares was executed on August 10th?
A. It says August 10th, 1959, 5:01 p.m. This does not state it was executed at that time. This is just the time stamp on the back.

Q. Well do you know when the time stamp was placed on the back of such an order? A. Yes, sir, when the treasurer receives it.

Q. I call your attention to Plaintiff's 13 and ask you if you can ascertain when that order was placed? A. August 10, 1959, date: 4:08 time.

Q. So your testimony is you don't know when this order but based on these orders you still think they were placed on the 10th and 11th?
A. I know they were. It says here --

Q. Well is your testimony --

MR. RYAN: May he be permitted to complete his answer?

THE COURT: Yes.

MR. DERRICKSON: I am sorry.

MR. RYAN: You started to say it says here.

A. It says here after 5:01 P.M. August 10, 1959. I can only sell you 1000 now as late as this hour. If you give me the okay I will go to work in the morning. Signed Joe.

Q. May I ask you then if the confirmations from Gregory & Son on Plaintiff's Exhibits 14 and 15, indicate that they think they sold the shares
54 on August 10th? A. No, sir, not to me.

Q. What do they indicate? A. That indicates that somebody typed in those dates. This is fairly common practice. Many tickets have been backdated. Many confirmations have been back-dated to my knowledge.

Q. You say typed in. Do you mean this stamp on the confirmation from Gregory on August 10, 1959? A. Yes, sir.

Q. So you are saying this is incorrect? A. One of those dates is incorrect. A 1000 shares of that stock was executed on August 11, 1959.

Q. Now was the price known on August 11 fully? A. The price per share and the number of shares bought was known on August 11 and on August 10th for each of those tickets.

Q. Why didn't you put the check in then on the 12th? A. Because Mr. Sekuler instructed me not to put it in until he received his confirmation.

Q. Was he to call you when he received them? A. He was to call me or I was to call him when I got mine. I didn't get mine at that time either.

Q. What time? A. August 12th.

Q. You were a salesman in that firm and as such you knew the order had been executed? A. Yes, sir.

55 Q. And you knew this payment was due on August 14th, why didn't you put the check in on the 14th? A. I was home sick on the 14th.

Q. Were you at the office at any time on the 14th? A. I don't think so, no, sir.

Q. Was that a Thursday? A. No, the 14th would have been a Friday.

Q. Was there any reason why you didn't leave the check with the cashier and instruct the cashier to fill in the check when the confirmations had been mailed out? A. I have already answered that. Mr. Sekuler instructed me not to turn in the check until he received his confirmations.

Q. Do you know why he so instructed you not to turn it in? A. No sir. It was his right to do so.

Q. In other words, you received the check so that you could place the order for the securities but then you held it before you deposited it on his instructions? A. Yes, sir.

Q. And without knowledge of why he wanted you to hold the check? A. May I see one of those confirmations again, please?

Q. Certainly. You may see the check if you would like. A. No, I don't need the check. It says here in very large type at the bottom of this, if the above entry is in error, kindly notify us at once. I assume it

56 is possible that Mr. Sekuler wanted to make sure it was correct and if there were any errors to correct them before putting in the check.

It also says, this is a confirmation and bill combined. Now it is the

man's right not to pay until he is billed. It is also his right to make sure if there are any errors they be corrected at once before payment is made.

Q. Now as Mr. Sade & Company's representative, didn't you think that you had received payment when you received that check? A. I didn't understand that question.

Q. Did you think you had received payment for those securities when you received that signed check on August 10th? Did you so consider that for payment? A. No, the check wasn't filled in at the time.

Q. Well in other words it didn't matter to you if you had the check or not? A. It mattered a great deal to me, I wouldn't have placed such an order without a check in my hands, without some evidence of good faith.

Q. And you advised Sade & Company that you had the man's check but you didn't turn it in? A. It was a matter of general conversation, yes.

Q. So that in essence it was a useless act for you to obtain that check? A. No, sir, it was not a useless check. I stated no such thing.

57 It was not a useless act at all.

Q. Now on the 14th when you knew payment was due you stated you were ill? A. Yes, sir.

Q. And yet you still didn't send the check by messenger or have Sade & Company to send a messenger to pick it up? A. I was very ill and I had no thought of any business transactions of any kind.

* * * * * * *

58 Q. And on the 19th did you receive a phone call to bring the check in? A. Yes, I did.

Q. And what was your response to that inquiry? A. It was a sudden realization that the check was over-due and the determination was to bring the check in immediately which I did.

Q. And you then had a fever of 104 or 104-1/2? A. Yes, I did.

Q. Now at any time did Mr. Sekuler tell you that the money was as

good as in the bank? A. Yes, this was a week or some eight days a little bit more prior to August 10th.

Q. Now after August 19th you testified you went on vacation? What was that date, sir, I am sorry? You left town after August 19th? A. I believe I left town on August 20th which was a Thursday.

Q. And your condition permitted that movement? A. My condition doesn't prohibit movement at all.

Q. I am sorry. I mean the illness, the fever of 104 had abated so you could leave town? Is that it? A. It was down to 102.

Q. And you left town and you returned on about the 24th or 25th of August? A. If I left on Thursday the 20th, I returned on the following
59 Monday, whichever date that was.

Q. Were you then apprised that the check had been returned for insufficient funds? A. Yes, I was.

Q. Who apprised you of that fact? A. My father.

Q. What did you do then? A. I called Mr. Sade.

Q. At his office? A. Yes, sir.

Q. And what was your comment to Mr. Sade? What did you tell him to do? A. I told him I would like to come down to the office right now and he said since it was 5:00 o'clock it was futile to come down at that time, could I come in the following morning?

Q. Did you call Mr. Sekuler? A. Yes, I did.

Q. What did Mr. Sekuler tell you? A. He said to redeposit the check and it would be good.

Q. Did you accept that as absolute assurance that the funds were in the bank again? A. No, sir, I did not.

Q. Did you cause the check to be redeposited? A. Beg your pardon?

Q. Did you cause the check to be redeposited? A. No, sir, the
60 check was out of my hands.

Q. But he told you the check was good again? A. Yes, sir.

Q. Was there any question in your mind upon receipt of the check on August 10th that the funds were not in the bank? A. None whatsoever.

Q. Was Mr. Sekuler's request to hold the check until he received confirmation, a regular request of customers? Was that normal?
A. Well this has happened to me in the past.

Q. Is it normal business activity? A. Yes, I would say so.

Q. To give a check and then to have it held in blank? A. On occassions.

Q. What is customary? A. I don't follow you, sir.

Q. What is customary in a stock transaction when you receive an order? A. It is customary that a buy-order be written and a purchase or sale executed, confirmation sent, and then payment received. In almost all cases confirmations are sent before payment is received.

* * * * * * *

61 BY MR. DERRICKSON:

Q. Did you inform your employer that you had the blank check on August 10th? A. I don't know if I informed them on August 10th or not but he certainly knew that I had the check.

Q. Were you in the office on August 11th? A. Yes.

Q. For the full day? A. I think so.

Q. Could you have cashed the check in on that date? Was it on your person? A. No, sir, I couldn't have cashed the check.

Q. Was it on your person? I am sorry? A. Yes.

Q. Were you in the office on the 12th of August? A. Yes.

Q. And the check was on your person? A. Yes.

Q. You could have put it in on the 12th? A. No, sir, I could not have.

Q. Except for Mr. Sekuler's instructions you could have? A. Those are very important instructions, sir.

* * * * * * *

62 Q. Do you know when Mr. Sekuler got his confirmations? A. I subsequently learned that he got them on Friday, I think, of that week, which was August 14th.

* * * * * * *

63 Q. Do you know what Mr. Sekuler's banking affiliations were? A. Yes, it was Suburban Trust Company.

Q. How long had he had this banking connection? A. I think for many years.

Q. Had he any other banking connections? A. Not to my knowledge. I don't know one way or the other.

Q. You have been apprised of the fact that Mrs. Sekuler has stated that you were involved in this purchase with Mr. Sekuler? A. Stated to whom?

Q. Stated in a conversation to representatives of the Surety Company and of the plaintiff's, that you were involved in this and intended to split the profits with Mr. Sekuler? A. I never intended to split any profits with Mr. Sekuler on any stock transaction.

Q. Were you aware that she made the statement? A. No, sir, I am not.

Q. Did anyone ever tell you that she had made such a statement?

64 A. Oh, yes, somebody told me she had made such a statement.

Q. As a result of that statement that you were in complicity with Sekuler, did you ever speak with Mrs. Sekuler about the statement? A. I know of no such statement that Mrs. Sekuler ever made. I was told that she had made a statement.

* * * * * * *

Q. In other words, do you think she made such a statement?

65 A. No, sir, you wrote that statement.

Q. Did you ask her if she made the statement? A. No, sir.

Q. You never asked her although she said that you were involved. Is that your answer? A. I saw that statement. You wrote that statement, not Mrs. Sekuler.

* * * * * * *

Q. You never questioned her as to its truth? A. I know it is untrue.

Q. I asked you if you questioned her? A. I can't question her as to its truth. I know it is not true.

Q. Did you ever ask her why she said that about you? A. I don't remember whether I did or not, Mr. Derrickson.

Q. Did you ask Mr. Sekuler if he knew why she made such a statement? A. Yes, I asked Mr. Sekuler why he thought she would sign such a statement.

* * * * * * *

THE COURT: Do you not want to follow it up and ask what Mr. Sekuler said?

MR. DERRICKSON: I will let you ask it, Your Honor.

66 THE COURT: As long as you asked him, why do you not ask him what Mr. Sekuler said?

MR. DERRICKSON: I will be glad to do that, Your Honor.

Q. What did Mr. Sekuler say? A. He indicated that he and Mrs. Sekuler were having some marital difficulties at the time and that Mrs. Sekuler might be seeking to be revengeful.

Q. Well why would that be vengeful on Mr. Sekuler if she said that you were involved? He was already involved? A. I don't understand what you mean by he was involved?

Q. He was already charged with having passed a bad check.

MR. RYAN: I object to that. This man Mr. Sekuler was never charged with passing a bad check.

* * * * * * *

67 Q. I asked you what Mr. Sekuler's answer was to your inquiry as to why Mrs. Sekuler said you were involved in this transaction? Would

68 you now like to answer that? A. Yes, sir, he was having marital troubles with his wife.

Q. And you also stated, did you not, that she wanted to be vengeful against her husband? A. I didn't say she wanted to be. I said she might want to be vengeful.

Q. Now my question is this: What vengeance does that show as to her husband, when she stated that you were involved? A. I don't know, sir.

Q. Was she angry with you? A. Not to my knowledge, no.

Q. Did you not realize at that time that Mr. Sekuler had given you a check which was returned for insufficient funds? A. Yes.

Q. So that didn't you realize he was already involved? A. I don't know what you mean by involved. You used that word once before.

Q. He had given you a bad check, had he not? A. Yes.

Q. So why did this statement effect Mr. Sekuler? It effects you, does it not? A. It affected us both, I imagine. It would indicate to me that if the statement were true, that there was a conspiracy between us, and that would certainly affect Mr. Sekuler.

69 Q. What was your financial condition at approximately August 10, 1959? A. I was earning about $700.00 a month; $800.00 a month.

Q. And what was your approximate assets or liabilities? The net amount, I am sorry? A. My assets were my automobile, my furniture, household possessions, et cetera; and my liabilities were several thousand dollars in medical bills.

* * * * * * *

71 Q. Then on September 3d did you authorize the funds in your account, along with your parents, be transferred to the Sekuler loss?
A. This was the effect of the document that I signed. However, this was not the promises and representations held out to my parents. Mr. Sade stated this money was to be put up as a basis for a loan so that he could buy these securities.

* * * * * * *

A. Mr. Sade also said this was just a technicality, that none of this money would ever be lost, and that because of the mix-up in this transaction we would probably be forced to make a profit.

* * * * * * *

80 BY MR. DERRICKSON:

Q. Are you familiar with Regulation T of the Federal Reserve Board? A. Somewhat.

Q. Governing security transactions? A. Somewhat.

Q. Would it have been possible -- correction -- would it be possible for a purchaser of securities to sell them prior to the seventh day if he has not paid for them?

MR. RYAN: Are we assuming here the certificates are not in the purchaser's name, and which are in street form, such as these were and which were being held by Sade & Company?

MR. DERRICKSON: We are assuming all of those things.

THE COURT: Are you?

MR. DERRICKSON: We assume all those things, Your Honor.

A. Under Regulation T I don't think it is possible to sell securities before you pay for them, no, sir.

Q. Now if you were a purchaser of securities and you made a purchase, let us say on the first of the month, and you decided to sell one of

81 these later, due to market conditions, wouldn't the broker have to accept the order? A. Only if you had paid for the securities.

Q. And that is your understanding of Regulation T? A. In fact this has happened to a number of our customers previously where they bought securities and sold them before settlement date, due to a nominal price rise and it was required that they pay for the securities before they sold them or on the date that they sold them.

Q. So that they were allowed to sell them but at the same time the firm wanted contemporaneous payment? A. That's right. Payment by the time they had sold them.

Q. You are not familiar with Regulation T to the extent to know if it states whether that can or can't be done. A. It states you must pay before you sell, I think. I am not sure of that but I think it so states.

* * * *

83 REDIRECT EXAMINATION

BY MR. RYAN:

Q. In addition, to recommending this stock to Sekuler, did you recommend it to any of your other customers? A. Dozens of them.

Q. Did any of your other customers purchase stocks of this

corporation? A. Yes, quite a few of them.

Q. Now you related in response to Mr. Derrickson's interrogation that you first learned of the fact that this check has been dishonored when you returned to the city on August 24, 1959? Monday Night? A. Yes, that was Monday night.

Q. And was it that same night that you called Mr. Sekuler?
A. I tried to call Mr. Sekuler that night. But I do not remember whether I was able to reach him that night or not or the following morning. But, I certainly tried to call him that night. Whether I spoke to him or not I don't remember.

Q. In your conversation with Mr. Sade, I believe you said you called Mr. Sade around 5:00 o'clock that evening? A. That is when I got home.

* * * *

84 Q. In that conversation with Mr. Sade, did Mr. Sade indicate to you that he was going to seek criminal prosecution of Mr. Sekuler? A. Not at that 5:00 P. M. telephone conversation but he did the following day.

Q. And the following day was the 26th and Mr. Sekuler was there then in the Sade office? A. I believe he was, sir.

Q. And what, if anything, did Mr. Sekuler say was the difficulty with his check? A. He said there was some sort of a mix up. I don't remember his exact words but words to the effect that there was a mix up or some people had backed out. I don't know.

Q. Did he then indicate he would endeavor to or could possibly obtain the funds from some other source? A. Yes, he indicated that.

Q. And to your knowledge did he come in later that same day with some funds? A. It was either that day or the next day that he came in with $1900.00

85 Q. Do you recall how that $1900.00 was? Was it -- A. It was cash. It was nineteen $100.00 bills.

Q. Nineteen $100.00 bills? A. Yes.

Q. Was that an unusual type transaction for somebody to come in with that much cash, to the company? A. I would think so, yes, sir.

* * * *

[Filed January 30, 1962]

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL ANSWER OF DEFENDANT

Comes now the defendant herein and moves the Court for leave to file a supplemental answer to plaintiffs' complaint in order to place of record in the pleadings herein, defendant's reliance as a ground of its defense, upon the exclusion of trading losses from coverage under the bond in this case, except when coupled with losses occurring under Clauses A, D, or E of said bond. A copy of defendant's proposed supplemental answer is attached hereto as "Exhibit A."

For grounds of this motion defendant avers as follows:

1. All of the evidence adduced at the trial of this cause strongly tended, if not conclusively, to establish that the transactions of which plaintiffs were complaining, constituted "trading."

2. If plaintiffs' losses did result from "trading" and were not otherwise incorporated in losses within the purview of Clauses A, D, or E of the bond herein, plaintiffs are barred from recovery under Section 1(g) of the bond which excludes "trading" losses.

3. Defendant did not raise this specific defense as a "legal" contention until argument of the case because at all times prior thereto plaintiffs had asserted and described actions which they contended were either dishonest, fraudulent, or criminal, or which constituted "On Premises" loss of property. Their proof however established, so defendant contends, only a trading loss.

4. Neither plaintiffs' pretrial statement nor that of the examiner recited or indicated facts which would warrant this special defense.

5. The issue being raised hereby is a pure question of law, and was accordingly already inherent in the case, and has been met and briefed by all parties.

6. Rules 15(b) and (c) permit the action now sought by defendant.

/s/ Harry L. Ryan, Jr.
Attorney of Defendnat

* * *

Let this be filed:

/s/ LUTHER W. YOUNGDAHL
United States District Judge

[Filed January 30, 1962]

ORDER GRANTING LEAVE TO FILE SUPPLEMENTAL ANSWER

The defendant herein having moved for permission to file a supplemental answer to plaintiffs' complaint in order that the pleadings and evidence herein be in conformity, it is by the Court, this 30th day of January, 1962,

ORDERED that the defendant herein be and it hereby is permitted to file a supplemental answer to plaintiffs' complaint, and this cause will be continued to permit the parties hereto to introduce such further evidence as they may be advised on the issue raised by such supplemental answer.

/s/ LUTHER W. YOUNGDAHL
United States District Judge

* * *

[Filed February 2, 1962]

SUPPLEMENTAL ANSWER OF DEFENDANT

Comes now the defendant herein, and leave of Court having been first of obtained, files this its Supplemental Answer to plaintiffs' complaint.

FIFTH DEFENSE:

Defendant avers that if plaintiff sustained any loss as a result of the actions of Thomas Guren and/or Stanley Sekular, as in their complaint alleged, such loss did not result from any act or action for which

losses are recoverable under Clauses A, D or E of the bond herein; that such losses resulted directly or indirectly from trading, and are accordingly excluded from coverage under the said bond by virtue of Section 1(g) of the same.

/s/ Harry L. Ryan, Jr.
Attorney for Defendant
* * *

[Filed February 7, 1962]

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL ANSWER

Although the Court has heretofore ruled on defendants motion, plaintiffs to clarify their position, interpose this objection to defendants "Motion For Leave to File A Supplemental Answer," in which it invokes as a defense the trading loss exclusionary clause 1(g) of the bond in question (px 34), for the following reasons:

1. The applicable facts and law do not warrant a supplemental answer. If defendants motion is considered a supplemental answer, Rules 15(b) and (c) of the Federal Rules of Civil Procedure, relied upon by defendant, do not apply. Should the Court consider defendant's motion to be for leave to file an amended answer, the applicable rules prevent it from being granted.
2. Reliance on an exclusionary clause in a bond or insurance policy constitutes an affirmative defense and, therefore, must be pleaded affirmatively at the outset and proved by evidence adduced at trial. Defendant's trading loss "defense was not timely made, affirmatively pleaded or proven by evidence of record, therefore, the defense has been waived.
3. Contrary to defendant's assertions in paragraph one of its motion, the transaction in question does not constitute "trading" and the defendant has offered no proof to show that this is a trading loss or that the transaction in question falls within exclusionary clause

1(g) of the bond, and there is no such evidence of record. The burden of proof is on defendant to submit such evidence and prove the applicability of an exclusionary clause; plaintiffs' are not required to negate its effect to recover.

4. Contrary to defendant's statements in paragraphs three and four of its motion, virtually all facts which were proved were known to defendant prior to trial. This is adequately demonstrated by the record itself including depositions of Leo Sade and Thomas Guren; plaintiffs' answers to defendant's interrogatories; plaintiffs' detailed pre-trial statement; defendants pre-trial statement and the pre-trial Examiner's pre-trial report all of which outlined in great detail all facts pertaining to the case and the transaction in question. Plaintiffs' proof adhered strictly to its statements of facts in their pre-trial statement.

5. Even if the loss in question were determined by the Court to be a "trading loss," and plaintiffs urge most emphatically that it is not, it resulted from dishonest, fraudulent and criminal actions of plaintiffs' employee, Guren, and is therefore compensable under section (A), the fidelity section, which is specifically expected from the scope of the trading loss exclusionary clause 1(g).

/s/ Lloyd J. Derrickson

/s/ Frank J. Wilson
Attorneys for Plaintiffs

* * *

[Filed February 20, 1962]

MEMORANDUM AND ORDER

Upon consideration of the record and pleadings in the above styled matter, the evidence adduced at trial of said action, extensive supplemental memoranda submitted by the parties, and after consultation with counsel in chambers, the Court exercised its discretion under

Federal Rules of Civil Procedure 15(b) and (c) by granting defendant's motion for leave to file an amended answer (January 30, 1962) for the following reasons:

1. The great bulk of the evidence presented at trial indicated to the Court that the "trading loss" exclusion provision of the surety bond must, of necessity, be considered in any determination of this cause of action. The trading loss issue, although not separately delineated, was, in effect, tried to the Court with the implied consent of both parties.

2. Plaintiffs' complaint, alleging fraud and collusion by Guren and Sekular, states a cause of action under coverage "A" of the broker's bond. The pretrial order signed by plaintiffs' counsel reaffirms this position. After completion of pretrial, plaintiffs first requested an amendment of the pretrial order so as to include a claim under coverage "B" on the throry of fraud perpetrated upon Sade & Co. by Sekular alone. This was allowed over the objection of defendant's counsel. At this juncture it may have been wiser for defendant to further amplify its position by amendment of their previously asserted defenses. This they did not do. However, the Court reads defendant's second defense[1/] as raising the issue of a "trading loss" exclusion. The purpose of Federal Rule of Civil Procedure 15(c) is to allow a pleading to be amended in order to further clarify an issue "attempted to be set forth in the original pleading."

3. The legal analysis of the "trading loss" issue was brought to the Court's attention in the closing argument of defendant's counsel. At that time plaintiffs' counsel did not object to this argument as outside the scope of the pleadings. Nor did plaintiffs' counsel request a continuance in order to offer evidence in refutation of the defendant's contention. In extensive supplemental memoranda submitted to the Court by both

---

1/ Defendant's second defense states as follows: "Any loss sustained by Ps resulted from the acts of a person other than Ps' employee, and between which person and Ps' employee, no collusion existed."

parties, the "trading loss" issue was thoroughly argued and analyzed. At that point the Court would have felt justified in rendering a decision. However, in the interest of absolute fairness, the Court called counsel into chambers, discussed the matter with them, and informed counsel that an amended answer would be allowed and a hearing held in order to receive further testimony on the "trading loss" issue. If counsel so desire, additional memoranda on the "trading loss" issue will be received up to the date of said hearing.

WHEREFORE, it is by the Court this 19th day of February, 1962,

ORDERED, that a hearing will be held in open court and further testimony received in the above styled matter on the 7th of March, 1962, at 10:00 A. M.

/s/ LUTHER W. YOUNGDAHL
Judge

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

202 Washington, D. C.
March 7, 1962.

* * * * *

204 LEO SADE

a plaintiff herein, was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. DERRICKSON:

Q. Mr. Sade, I direct your attention to the broker's blanket bond which is the subject matter of this suit, and ask you if you recall reading the clause which refers to trading or trading losses being excluded from the coverage of the bond? A. I don't recall the details but I read it.

Q. And so that you recall that it does refer to trading? A. It

205 does refer to trading.

Q. Now, Mr. Sade, does the term trading have a specific meaning in the securities business?

MR. RYAN: Object to that, if Your Honor please. I think it is a question of law for the Court to determine.

THE COURT: He may answer the question. You will have a right to offer any testimony you desire.

MR. RYAN: I want to reserve that point.

THE COURT: That is all right.

BY MR. DERRICKSON:

Q. You may answer. A. What was the question again?

Q. Does the term trading have a specific meaning in the securities business? A. Yes, it does.

Q. Can you tell me what that meaning is? A. You have the right to -- trading is for the firm on the principal basis.

THE COURT: Only when the firm buys stock?

THE WITNESS: Only when the firm buys stock for their own account it is called trading.

THE COURT: Of course that isn't what the provision says.

206 THE WITNESS: Your Honor, I don't understand the policy.

THE COURT: The provision says any loss resulting directly or indirectly from trading with or without the knowledge of the insured and the name of the insured, or otherwise -- the name of the insured or otherwise, you see, whether or not represented by any indebtedness or balance shown to be due the insured on any customer's account.

It wouldn't seem to indicate from the reading that it applied only to the brokers.

THE WITNESS: I would like to explain it, if possible.

THE COURT: Go ahead. That is what we are here for.

THE WITNESS: That's right.

When we buy for the firm and we lose money, that is what I want to say, when we lose, we don't claim any losses because that is our own risk, we buy for the firm. But when we buy for a client and he, in turn, like this case, if I express it, Your Honor, in this case, like you buy

for a client who did not pay, it is not the term trading. It's we bougnt it for nim as an agent. We charged him a commission. It's not tne principal basis. That's what the whole crux of the problem is.

BY MR. DERRICKSON:

207 Q. So, if I might, Your Honor, the term trading, as used in the securities business, means when you buy and sell for your own account? A. That is correct.

Q. And if you buy and sell for a customer's account, what does that refer to in the business? A. For a customer's account.

Q. Yes. A. We buy for a broker.

THE COURT: What is the term used when you buy for a customer's account?

THE WITNESS: At that time I am a broker.

THE COURT: What is the transaction called?

THE WITNESS: It's a purchase.

THE COURT: Isn't that the same as a trade?

THE WITNESS: It's not, Your Honor, because a trade --

THE COURT: Why should the term trade be different than if a customer buys a stock than if a broker buys the stock? The transaction is the same. You are still purchasing the stock if you buy the stock, aren't you?

THE WITNESS: The broker purchases the stock from another broker, either as a broker or --

THE COURT: Suppose the broker purchases on the market, what do you call it then?

208 THE WITNESS: On the market, that means on the Exchange.

THE COURT: Yes.

THE WITNESS: We are broker and we carry it as an agent.

THE COURT: For your own account, if you buy stock on the Exchange, what would you call that?

THE WITNESS: For my own account it's trading; for the firm's account, it's trading.

THE COURT: Yes, but you are buying it on the market.

THE WITNESS: Yes.

THE COURT: And if you buy stock for a customer on the market you don't call that trading?

THE WITNESS: No, Your Honor.

THE COURT: But it is still the same kind of a transaction, exactly, isn't it?

THE WITNESS: No, Your Honor, it is not the same kind of transaction.

THE COURT: Why isn't it? The only difference is you are buying the stock in one instance and you are buying it for the customer in the other instance. It's the same to the extent that you are buying it in the open market.

THE WITNESS: I am buying it in the open market, but it's not a
209 trade, it's an order given as an agent to buy for the account of a certain client.

THE COURT: In one case; and in the other case it's your direct order to buy for yourself?

THE WITNESS: Yes, but it's for the risk -- and I am not insured for my own account for the firm, we are not insured because we trade and when we trade on our own account, or the account of the firm, we lose and make, that has nothing to do with the insurance company.

THE COURT: How much premium did you pay on that bond?

THE WITNESS: We pay $400 right now.

THE COURT: Per year?

THE WITNESS: Per year.

THE COURT: On this policy?

THE WITNESS: On this policy.

THE COURT: And you claim that covers any losses that you might have in buying stock?

THE WITNESS: Yes, Your Honor. According to them it covers only my furniture that is carried out.

* * * * *

217 THE COURT: When do you claim you first knew this $100,000 check came in?

THE WITNESS: When I knew first?

THE COURT: Yes.

THE WITNESS: Your Honor, we do not --

THE COURT: No, no. My simple question is, didn't you testify before, when you first had knowledge that that --

MR. DERRICKSON: Can we show him the check, Your Honor?

THE COURT: Yes, sure. It is my memory that you testified that you knew about the order before it was executed, isn't that right?

218 Didn't you testify as to that?

THE WITNESS: I assume when a person, who is in charge of the office --

THE COURT: No, no, Mr. Sade. This is a simple proposition. If your memory is different from mine, just say so. We have the record so we can refer to the record. But don't you recall testifying before whether or not you had seen the check, that you knew about the transaction before it was executed, that it had come into the office?

THE WITNESS: Yes.

THE COURT: You did testify as to that?

THE WITNESS: Yes.

* * * * *

THE COURT: But you knew there was a $60,000 order before it was executed?

THE WITNESS: Do you mind if I explain the nature --

THE COURT: Let's first find out whether you did --

THE WITNESS: Yes, I did, either a day or two later.

THE COURT: No, no. I say, before it was executed.

THE WITNESS: No, not before.

219 THE COURT: You did not know?

THE WITNESS: No, the manager knew about it.

THE COURT: Your manager knew about it?

THE WITNESS: Yes.

THE COURT: Well, that is knowledge to you.

THE WITNESS: Exactly.

THE COURT: That is knowledge to you. So, at least, your manager knew about it and he knew the extent of the order; $60,000 is no small order. My point is that before the order was executed your manager, having knowledge of the fact that a $60,000 order came in, which is a rather substantial order --

THE WITNESS: Your Honor, we, every hour, handle transactions like this.

THE COURT: You don't have a $60,000 order every hour, do you?

THE WITNESS: In the last few years, if you take it as an average, yes.

THE COURT: And you don't take --

THE WITNESS: We had orders for half a million dollars.

THE COURT: And you take checks on these orders?

THE WITNESS: Only from people that we know.

THE COURT: What?

220 THE WITNESS: Only from people that we know.

THE COURT: But you do take checks on these orders?

THE WITNESS: We take checks. I don't understand the question.

THE COURT: On the $60,000 orders you take checks and execute the orders before the checks are returned from the bank or before you call the bank to find out if there is sufficient money?

THE WITNESS: People we know that we do business with.

THE COURT: What do you do when you get a check from people you do not know?

THE WITNESS: As soon as the check is given we call the bank.

THE COURT: In this particular case did the manager know this man?

THE WITNESS: The manager knew the man. He was in the office.

THE COURT: He knew him? And because he knew Sekular, the manager knew Sekular didn't he?

THE WITNESS: He traded with him, but he didn't know him.

THE COURT: Well, did the manager, not having known Sekular, then, why didn't the manager call the bank?

221 THE WITNESS: Your Honor, we can't call the bank until we get the check, knowing what bank it is.

THE COURT: Why didn't he ask Sekular what bank, if he was giving a check, so he could call the bank?

THE WITNESS: The order wasn't executed at that time when he was talking to him.

THE COURT: He could have found out whether he was paying cash for it or giving a check; a person doesn't ordinarily come in with $60,000 in cash.

THE WITNESS: Your Honor, that is not exactly the case. You are trying to put words in my mouth.

THE COURT: Does a person ordinarily come in with $60,000 in cash?

THE WITNESS: No, nobody pays in cash.

THE COURT: So they generally give a check?

THE WITNESS: Right.

THE COURT: So your manager, naturally, would assume he would be presenting a check for this order?

THE WITNESS: Yes, but we do not ask, usually, the person to give the check before he is going to buy it. This was an issue that was going to come out. You don't go ahead of time, Your Honor, and get this.

THE COURT: When this order did come in for the purchase of the stock before the transaction was actually executed, your manager

222 knew about it, that Sekular already had presented an order for the purchase of $60,000 worth of stock?

THE WITNESS: I will have to look it up, it's been so long I don't remember.

THE COURT: All right. Go ahead.

BY MR. DERRICKSON:

Q. So that in the brokerage business would you tell us what the term trading loss applies to, to other brokers, not to customers or other people, but between brokers, if you state to another broker you had a trading loss, what does that mean? A. That means I have bought and sold and I have realized a loss, and that's all.

* * * * *

233 THE COURT: Mr. Sade, I am trying to refresh my recollection. Are you sure before that you didn't indicate at the trial before me that you didn't testify that this transaction of stock had been purchased, that you were aware that the order was in the office with authority to buy up to $100,000, and it was finally executed for, I think, $61,000; wasn't that the situation?

THE WITNESS: Is the question, Your Honor, did I know of the order?

THE COURT: Yes. In the trial before me, the trial before, that you didn't testify that you knew that this order was in the office with

234 authority to buy up to $100,000 of this stock over the counter and that it was actually consummated, I believe, for $61,000, but isn't it true that you testified before that you were aware of this?

THE WITNESS: Yes, either the same day or the next day. That is the way I put it.

THE COURT: Before the stock was purchased?

THE WITNESS: Not before the stock was purchased.

THE COURT: That is what I am asking about. I want to get the question clear, now. I will have to refer to the record.

THE WITNESS: After the stock was bought.

THE COURT: Isn't it true that you testified before you knew about this before the stock was bought?

THE WITNESS: Not ahead of time, Your Honor.

THE COURT: It is your recollection?

THE WITNESS: It's my recollection, Your Honor.

THE COURT: All right.

MR. DERRICKSON: Could I ask a question to clarify it in my mind?

THE COURT: Sure.

BY MR. DERRICKSON:

Q. Did you testify previously that you knew the salesman had a large order, you didn't know the amount, but you knew it was a sub-
235 stantial order, prior to the time that you became aware that the order was executed? A. I have been through this about fifteen times, I am getting even confused, I don't remember even exactly when and what. It is hard to get back after three years, you know, so many things happening.

THE COURT: This was in February when we had this trial.

MR. DERRICKSON: December, Your Honor.

THE COURT: December, yes.

THE WITNESS: Yes, December.

THE COURT: Just three or four months ago, less than three years, four months.

MR. DERRICKSON: Your Honor, I think I have a method of getting --

THE COURT: What I was going to say, it would have been just as hard for you to remember then, but as I recall you did testify that you were aware that this order was in the office, with authority to buy this stock before the stock was purchased.

THE WITNESS: Whatever I stated --

THE COURT: We can refer to the record in the case.

THE WITNESS: I don't want to make a statement which I don't know for sure.

236 * * * * *

MR. RYAN: Maybe I can help refresh his recollection, if Your Honor please.

CROSS EXAMINATION

BY MR. RYAN:

Q. Mr. Sade, you testified as a witness in the case of William J. Guren and Ann W. Guren against Leo Sade, et al. You made a depo-

sition December 22nd, 1960, did you? A. I sure did.

Q. Do you recall that you were asked as to whether or not you had a conversation with Mr. Guren about this transaction on or about August 4th or 5th and the question was:

"What happened on August 4th or 5th, you had this conversation, is that what you mean?"

And you answered: "That is correct.

"Question. Where did this conversation take place?

"Answer. They expressed this as a happy --"

And then you were interrupted: "Where did it take place?"

237 You answered: "In the office.

"Question. Who was present? "Answer. I don't recall but I know Guren talked to me."

And earlier than that:

"Mr. Sade, exactly when, I mean, by which date did you first become aware of the fact that S. Thomas Guren had taken an order from Stanley Sekular for the purchase of stock in the Television Management, if that is the name of it."

You answered: "Exactly the time.

"Question. What date? "Answer. I will say this will be more precise: I remember that Guren told me even before the stock was issued that he was going to have that kind of an order."

Does that refresh your recollection? A. Thank you.

Q. Somewhere around the 4th or 5th of August you had discussed with Guren the placing of such an order. A. Thank you very much.

* * * * *

238 JOSEPH DYER RIVIERA

called as a witness on behalf of the Plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DERRICKSON:

Q. Will you state your full name, please? A. Joseph Dyer Riviera.

Q. And your occupation, please? A. Stock broker, President

of Riviera, Marsh & Company, Inc.

Q. Is that firm a registered broker-dealer with the Securities & Exchange Commission? A. Yes, it is.

239 Q. How long have you been engaged in the securities business, Mr. Riviera? A. Nine years.

Q. And can you tell me what your past employment has been in that business? A. I have been president of this company for the past five years, for four years, prior to that, I was manager of the trading company of Folger, Nolan & Fleming & Company.

Q. Is that a Washington firm? A. That is a Washington member of the New York Stock Exchange, yes.

Q. Can you describe what your present duties are as president of your own firm? A. I am Chief Executive and Administrative Officer of the company.

Q. Can you tell me what your duties were with Folger, Nolan & Fleming? A. I managed their trading department which is an over-the-counter trading department.

MR. DERRICKSON: I would like to at this point submit that the man is qualified as an expert in the securities business.

THE COURT: Go ahead.

BY MR. DERRICKSON:

240 Q. Is the term trading used in the securities business, to your knowledge? A. Yes; probably overly used.

* * * * *

Q. Can you tell me what trading means to a broker or a dealer? A. Yes, but I think I am going to have to explain the difference between being a broker and a dealer, first. We are all registered with the Securities & Exchange Commission as broker-dealers. When we are

241 acting as broker we are acting as an agent for a client who is trading. In other words, he profits or loses by the transaction. When we are acting as a dealer we are executing transactions for our own account and our own risk and we may profit or lose by trading. So trading is a purchase or sale for the account of a principal, the principal may be the firm, the principal may be a client.

THE COURT: So that trading doesn't necessarily refer to broker alone.

THE WITNESS: That is correct. The client may be trading, usually is, for example, in a New York Stock Exchange stock the client is trading.

THE COURT: That is what I always assumed. The little stock I bought I assumed it was trading when I dealt with a brokerage firm.

THE WITNESS: That is right.

BY MR. DERRICKSON:

Q. So that, in a general sense, trading can be applied loosely. What does it mean to a dealer in securities? A. As a dealer in securities we are trading only when we are buying or selling for our own account and risk. Of course, in this business, since we are registered both ways, this has to be clearly marked on every confirmation of every

242 transaction whether you are acting for your own account and risk or whether we are acting as agent for the client's account and risk. So you can tell specifically on every transaction who is trading.

THE COURT: But when you have a provision in an insurance policy speaking about a trading loss without mentioning whether it refers to a broker or a dealer, you can't tell what that means.

THE WITNESS: I would assume, Your Honor, it would apply to any trading loss. So far as I know, Lloyds will insure a trading loss and one could, in this country --

* * * * *

BY MR. DERRICKSON:

Q. In other words, Mr. Riviera, trading loss to a broker, if another broker told you he had a trading loss, you would know it would

243 be for his own account? A. That is correct, that is the only way a broker can have a trading loss, when he is acting for his own account and risk as a dealer or principal.

* * * * *

THE COURT: If you bought stock for a customer, the customer

gave a check and the check bounced, do you figure your bond would cover it?

THE WITNESS: Your Honor, I have not specifically read my policy, I am covered by the same sort of thing which we were discussing here this morning. And, let me say this: Counsel showed me the paragraph in question with regard to this and I read it. I don't know whether I am covered for it, either, now. That, obviously, was not written by anyone in the securities business. It is gobbledygook and I don't know what it means.

* * * * *

244 THE COURT: Assuming no fraud on the part of the employee, on what provision of the policy would you rely?

THE WITNESS: As I say, I am not familiar with my own policy. We have dozens of insurance policies and I don't attempt to analyze them.

THE COURT: There is a provision A which covers fraud by the employee, and then there is a provision B which is entitled "On Premises" and it talks about robbery, burglary and so forth, and embezzlement on premises. Would you interpret that kind of a provision to mean where a customer would come in with a check and the check bounced

245 that it would be covered?

THE WITNESS: I honestly don't know. I think the first thing I would do would be to call my lawyer.

THE COURT: Would that sound reasonable to you?

THE WITNESS: Sir, you are asking me for an opinion I am not qualified to give. I would call my insurance man and my lawyer and say, am I covered?

* * * * *

247 THE COURT: In the general knowledge of the trade, when stock is purchased through a broker by a customer it is considered a trading transaction?

THE WITNESS: By the customer?

THE COURT: Yes.

THE WITNESS: In other words, trading, I will repeat it again, trading is the purchase or sale of securities for one's own account and risk as principal.

MR. DERRICKSON: That is in the securities business.

THE WITNESS: Now, the customer may be buying and selling for his own account and risk as principal or the broker or the dealer.

* * * * *

248 Q. If you were to read this clause -- excuse me -- Clause 1(g), "any loss resulting directly or indirectly from trading", would you think that this bond excluded a situation where you received a bad check from a customer and you suffered a loss thereby, would you consider that that was a loss from trading? A. No, that's impossible. You see, we have a separate trading account, every broker does, set up on his books. The trading account covers transactions where the broker acted as principal and where he bought and sold for his own account. You can have trading profits or trading losses, but that has nothing to do with this. Obviously, you are not going to be insured against the losses and they are not going to take the profits, either.

Q. So, if you had such a bond, you would consider that you were insured against other types of -- against frauds and other types of losses regardless if it involved a securities transaction and that you are not insured against your own losses when you purchase and buy securities for your own account? A. Or against a client's trading losses;

249 yes, sir.

* * * * *

CROSS EXAMINATION

BY MR. RYAN:

Q. Mr. Riviera, are you telling us in your opinion this provision indemnifies and protects the broker in either event, whether he has a loss in his own trading account or whether he has a loss when he trades for a customer? A. No, sir, just the opposite. What I am saying is that it does not protect against a trading loss whether the loss is on the

broker's part or whether a customer in trading buys the securities and sells at a loss. Obviously, this does not apply to trading losses.

Q. Do you put any significance on the words "directly" or "indirectly" in that Provision 1(g)?

MR. DERRICKSON: It is a legal conclusion, Your Honor.

MR. RYAN: He is expressing a legal opinion.

THE COURT: That is all he has been doing. He can do it on direct, counsel is certainly entitled to go into it on cross examination, counsel.

THE WITNESS: Well, to me, adding all those words is legal gobbledygook. What it says is a trading loss, in no way can a broker
250 have a trading loss on an agency transaction and this excludes trading losses.

BY MR. RYAN:

Q. Can't he have an indirect trading loss? A. I never heard of one. If you will give me an example --

Q. Let me give you an example. Let's say Broker A takes an order from Customer B and on Broker A's own account with an underwriter or a security house out of town, he places a blanket order for more shares than Customer B placed with Broker A, and purchased those shares from the underwriter or the issuer on his own account, the broker's own account, isn't that a trading transaction? A. Certainly, bought for his own account.

Q. All right. Now, those certificates are issued in street form and are received by Broker A and are retained by Broker A and never delivered to the customer who had issued the alleged bad check. Is that a trade? A. Has the broker acted as principal for the portion which he had an order for, did he act as agent or principal?

Q. I ask you, what did he act as when he ordered them from the issuer in New York on his own account and purchased from that issuer more shares than this particular customer had ordered? A. Is this
251 on a new issue?

Q. Yes, a new issue. A. No, this would be an ordinary trading

loss to the broker for the reason that the client is not required to accept or make payment for the order until he sees the final prospectus so that in a case like that if the broker ordered for his own account, he confirms with the prospectus, and the client says, no, there is something in the final prospectus I don't like, I don't agree with, I refuse the order, the broker has no recourse.

Q. Supposing, taking those same circumstances, the purchaser or customer in this account said I will not issue my check or you may not fill out my check until this sale is confirmed to me. Confirmation comes in some four or five days after Broker A had purchased those shares from the underwriter or issuer. What kind of a transaction would that be? A. It is the same thing, At the moment that the client receives his confirmation and his copy of the final prospectus, which he must have before the execution would be final, he has the right to refuse acceptance.

Q. So, up until that time, it was a trading transaction between brokers and then it became a purchase and sale between customer and broker?

252 MR. DERRICKSON: Is that as to any issues, Your Honor?

THE COURT: We are talking about this new issue.

BY MR. RYAN:

Q. The new issue. A. Yes, I would say that would be true.

Q. I would like to ask just one further quick question. I think you identified yourself when you were with Folger, Nolan as being in charge of the trading department? A. Right.

Q. What did the trading department do as between customers for Folger, Nolan, what was the nature of the trading department? Are you talking about trading there as the brokerage house or trading between customers, or just what was the trading department? A. Well, both. If we bought for the firm's account and risk, we were acting as dealer and we would trade with other brokers. If we were acting as agent for clients, then we were executing trades for the client's account. We were trading, you see.

Q. And that common trade term or common term was used regardless, you were in charge of the trading department? A. Well, simply, rather than to have a hyphenated department, that's what I say you have to be careful in the use of this term, so far as the brokers

253 are concerned, the person or company who is trading is the one who is taking the risk and who is doing it for their own account.

* * * * *

REDIRECT EXAMINATION

BY MR. DERRICKSON:

Q. Is it your testimony that a trading loss can only come about to a dealer in his own account? A. That is correct.

* * * * *

WILLIAM G. RUSSELL

called as a witness on behalf of the Plaintiffs and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DERRICKSON:

Q. State your name, please. A. William G. Russell.

254 Q. And what is your occupation? A. Insurance Broker and Consultant.

Q. How long have you been so engaged, Mr. Russell? A. Twenty years, a little over twenty years.

Q. In Washington, D. C.? A. In Washington.

Q. You are familiar with the bond in which this suit is brought? A. Yes, I am.

* * * * *

259 Q. In your opinion, Mr. Russell, does the term trading, the exclusion or a term trading in the bond exclude coverage in a situation where a broker receives a check which was illegally issued by a customer in the purchase of stock? A. I think you would have to go a little further before I could answer that. I could not answer that the way it is phrased, I am afraid. If you are asking me, in my opinion does the

term trading exclude that, no, not in my opinion.

Q. In other words, if a broker buys stock for a customer as an agent then any loss which is suffered through any fraud which the customer may have perpetrated is not excluded by the trading loss exclusion?
A. In my opinion no, it has nothing to do with it.

* * * * *

264 THE COURT: I understood you to say, Mr. Russell, that you understood this bond covered a transaction where a customer would come in with a check, -- let's make it specifically as it was in this case -- a blank check with authority to buy up to $100,000 of a new issue of stock that could be bought over the counter, and that if that check bounced because of no funds, that this bond would cover it; is that your opinion?

THE WITNESS: If there was fraud involved, Your Honor --

THE COURT: No, no, let's not have any ifs. The customer issues it in blank, with no funds in the bank to cover it, and it is presumptively fraud under the statute for anyone to issue a check without funds in the bank, so that is the presumptive fraud, and he issues a check with authority to fill in the amount up to $100,000 and for the purchase of a new issue of stock for $61,000 was actually purchased. Would you say this bond covers that?

THE WITNESS: In my opinion, Your Honor, it would. Fraud on
265 the premises.

* * * * *

THE COURT: You say even though the company did not intend to cover it it was covered, nevertheless?

THE WITNESS: In my opinion they did not intend to cover it but the way they have the contract worded, it is covered, yes, Your Honor.

* * * * *

[Filed April 17, 1962]

MEMORANDUM OPINION

Plaintiffs, a resident partnership engaged in the stock brokerage business under the name Sade & Co., commenced this action against defendant National Surety Corporation, a registered foreign corporation doing business in the District of Columbia, to recover from defendant the sum of $18,476.69, claimed due under a surety bond underwritten by defendant to secure plaintiffs against certain losses.

On April 1, 1959, National issued to Sade & Co. a standard "Brokers Blanket Bond," effective at the time of the transaction involved in this suit, providing protection to Sade & Co. up to the maximum amount of $30,000. The annual premium for this bond was between four and five hundred dollars. It is plaintiffs' contention that they are entitled to recover from defendant their sustained losses under either of two indemnifying clauses contained in the bond. Defendant, on the other hand, contends that plaintiffs are not entitled to recover under either of said clauses, since the transaction resulting in the loss is one specifically excluded from coverage under its bond.

The relevant provisions of the bond are as follows:

LOSSES COVERED

Fidelity

"(A) Any loss through any dishonest, fraudulent or criminal act of any of the Employees, committed anywhere and whether committed alone or in collusion with others, including loss of Property[1/] through any such act of any of the Employees.

1/ Wherever used in this bond Property shall be deemed to mean money, currency, coin, bank notes, Federal Reserve notes, postage and revenue stamps, U. S. Savings Stamps, bullion, precious metals of all kinds and in any form and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semi-precious stones, bonds, securities, evidences of debts, debentures, scrip, certificates,

On Premises

(B) Any loss of Property through robbery, burglary, common-law or statutory larceny, theft, hold-up, or other fraudulent means, misplacement, mysterious unexplainable disappearance, damage or destruction, abstraction or removal from the possession, custody or control of the Insured (whether effected with or without violence or with or without negligence on the part of any Employee) * * * while the Property is (or is supposed to be) lodged or deposited within any offices or premises located anywhere, except while in the mail or in any of the Insured's offices specifically excluded from the coverage of this bond * * *

This Bond Does Not Cover

(g) Any loss resulting directly or indirectly from trading, with or without the knowledge of the Insured, in the name of the Insured or otherwise, whether or not represented by any indebtedness or balance shown to be due the Insured on any customer's account, actual or fictitious, except when covered under Insuring Clause (A), (D) or (E)."

The present claim arose out of the following sequence of events: Sometime early in August, 1959, S. Thomas Guren, a registered securities representative and employer of Sade & Co., engaged in discussions with Stanley Sekular, a friend of long standing, relative to the purchase by Sekular through Guren and Sade & Co. of certain securities.

---

interim receipts, warrants, rights, puts, calls, straddles, spreads, transfers, coupons, drafts, bills of exchange, acceptances, notes, checks, money orders, warehouse receipts, bills of lading, withdrawal orders, conditional sales contracts, abstracts of title, insurance policies, deeds, mortgages upon real estate and/or upon chattels and upon interests therein, and assignments of such policies, mortgages and instruments, and other valuable papers and documents, and all other instruments similar to or in the nature of the foregoing, in which the Insured has an interest or which are held by the Insured for any purpose or in any capacity and whether so held gratuitously or not and whether or not the Insured is liable therefor.

Sekular ultimately determined to purchase a substantial amount of stock in Television Shares Management Company, a large mutual fund management organization controlling assets in the neighborhood of four hundred million dollars. This was a new issue and would be traded on the over-the-counter market. On the day that Television Shares Management Company's stock was first traded, August 10, 1959, Guren received an open order from Sekular for the purchase of up to $100,000 of said stock. At that time Guren informed Sekular that he could not accept such an order unless he had a check in his hands. Sekular thereupon came to the Sade & Co. office and gave Guren a check, blank except for Sekular's signature as maker and the word "August" with no specified date thereafter. Sekular instructed Guren that the check was to be completed and delivered only upon receipt by Sekular of confirmation by Sade & Co. to Sekular of the consummation of the transaction.

On several occasions prior to August 10th Guren had spoken to Sekular with regard to the latter's financial ability to effect a substantial securities purchase. Some ten days before that date of issue, Sekular informed Guren that $100,000 was to be deposited in Sekular's checking account for this purpose. Guren was further informed that the money was being supplied by certain executives in Philadelphia. On August 9th, Guren again asked Sekular how he intended to pay for the stock; Sekular replied, "The money is as good as in the bank." On the day of the purchase, Sekular told Guren, "The money is in the bank. Go ahead and buy it." Leo Sade, a partner in the plaintiff firm, admitted at the trial that he was aware of the receipt of this order prior to its execution.

On August 10th, Sade & Co. placed two orders for Television Shares Management stock for the Sekular account through the New York brokerage house, Gregory & Sons. 1,300 shares were purchased at 26-1/2 and 1,000 shares at 26-1/4. The total cost of this stock to Mr. Sekular, including commissions, was $61,440.55. Confirmation of the purchase was mailed to Sekular on that date. Due to illness, Guren was unable to come to his office on the settlement date, August 14th, or the

next two business days, August 17th and 18th. After having received a phone call from Miss Mahon, the office manager of Sade & Co., on August 19th, the seventh business day after purchase, Guren did come to the Sade & Co. office to turn in the Sekular check. The check was then completed as to amount and date and deposited for collection. On August 21st, Miss Mahon received a call from Sekular's bank informing her that there were not enough funds to clear the check. Guren was not aware of this until Monday, the 24th, for the reason that he had spent the week end with his family out of town. Upon receiving this information, Guren contacted Sekular who stated that there was some sort of "mix-up" and that the check should be redeposited. This was never done, as Sade & Co. then called Sekular's bank and learned that Sekular had only a $200 balance in his account. On August 25th, Sekular's "NSF" check was returned to Sade & Co.

A series of phone calls, conversations, meetings and accusations then ensued between Sade & Co., Sekular, Guren, and members of the families of the two individuals. On August 26th, Sade & Co. received $1,900 in cash from Sekular. On that same date a telegram was sent to Sekular reserving the right to sell out his account in full after 3:00 P.M., August 28th, "or as soon thereafter as practicable predicated upon prevailing market conditions." No further payments were forthcoming and sale of the stock was eventually effected in three separate transactions on September 1st and 3rd, and December 24, 1959. Due to a rapidly falling market in this stock, not only was it difficult to locate purchasers, but it was also necessary to incur substantial losses when the sales were finally effected. [2/] The total loss to plaintiffs was

---

[2/] A further credit of $4,323.03 was received by the transfer of securities from the accounts of Guren and his parents to that of Sekular. This amount is not reflected in plaintiffs' computation of damages since it is the subject of a suit presently pending in this court. Guren v. Sade, No. 365-60. Plaintiffs concede that should they prevail in that suit, there should be an offset against the above $18,476.69 plus interest in an amount consistent with that judgment.

$18,476.69.

On September 11, 1959, a notice of loss was sent to and claim made upon the defendant because of Sekular's fraudulent action in uttering a bad check. Subsequent to that date Leo Sade received certain information leading him to believe that Guren had acted in collusion with Sekular in an attempt to make a "windfall" profit on the Television Shares transaction. On September 25, Guren was discharged by Leo Sade and on October 14th, a further claim was submitted to defendant alleging Guren's complicity with Sekular. Both claims were rejected by defendant. Several efforts were also made by Sade through the United States Attorney's Office to prosecute both Sekular and Guren but no prosecution was ever commenced.

Plaintiffs' initial contention goes to the question of coverage under indemnifying clause (A) of the "Brokers Blanket Bond." Clause (A) provides the insured with coverage up to the maximum amount of the bond for any loss occasioned by the "dishonest, fraudulent or criminal act of any of the employees * * * whether committed alone or in collusion with others." Plaintiffs assert that in August, 1959, their employee Guren entered into a scheme with Sekular for the purchase of up to $100,000 worth of Television Shares Management stock when issued; that neither could pay for that amount of stock, but they hoped that after purchase, the price of the stock would rise so that it could immediately be resold at a profit; that the plan was for Guren to hold the check given him in payment for the stock by Sekular for a sufficiently long period of time so that resale could be effected and the proceeds of the sale deposited to cover the check.

If Plaintiffs' theory were substantiated by the proof offered at trial, there is no doubt that they would be entitled to indemnification under the provisions of clause (A) of the bond. Therefore, it is necessary to examine the evidence as to any "dishonest, fraudulent or criminal acts" by Sekular and/or Guren. Sekular did not testify at the trial of this cause of action. However, the evidence offered by others who did testify clearly established Sekular's fraud and bad faith with regard to

this transaction. Sekular caused Guren to believe that he was possessed of a substantial amount of money and that a check Sekular presented to Guren would be cleared up to the sum of $100,000, when presented for payment. On the day that the purchase in question was effected, Sekular unequivocally stated to Guren that the money was in the bank and the stock should be purchased. In truth, Sekular had no more than $200 in his account; the disparity between that figure and the one he stated to Guren cannot be explained away as a mistake. There is no doubt that Sekular was engaging in a fraudulent and dishonest scheme in an attempt to reap a windfall profit. However, although the fraud of Guren alone or Guren in consort with Sekular would give rise to a claim against defendant under clause (A), the fraud of Sekular alone is not enough to substantiate such a claim.

What of Guren's conduct? Plaintiffs' contentions proceed to outline a rather detailed scheme of fraud perpetrated upon Sade & Co. by Guren in collusion with Sekular. These contentions have already been summarily stated. There is no need for the Court to deal with them in any greater detail for plaintiffs have not proven by a fair preponderance of the evidence that Guren was a party to any fraudulent or dishonest scheme. Instead, the implication is clear that Guren, himself, was duped and defrauded by his former friend's protestations of newly acquired wealth. It may be that Guren acted carelessly in accepting such a large order without first checking on Sekular's financial worth, but his carelessness was certainly no greater than that of Leo Sade, a man of infinitely greater experience in the stock brokerage business, who admitted that he knew of this order prior to its execution, yet took no precautions to check on Sekular's financial ability. 3/ The Court

---

3/ The order was for an amount up to $100,000; Guren had only acted as a registered representative for a relatively short period of time; Sekular had never traded with Sade & Co. before. Despite confrontation with these uncontroverted facts, Leo Sade insisted to the Court that such a transaction is not unusual and that under these circumstances it is not the custom of Sade & Co. to take the precaution of a phone call to the prospective customer's bank. Such a method of doing business strikes the Court as inconceivable.

cannot engage in speculation when dealing with an accusation of fraud and dishonesty; it must be substantiated by evidence, and plaintiff has not sustained its burden of proof on this issue. And, of course, relevant to the charge against Guren is the fact that an unsucessful attempt was made to initiate prosecution against him by the United States Attorney's office.

But plaintiffs further insist that they may still recover under clause (A) because Guren, being plaintiffs' agent, owed a fiduciary duty of trust, good faith and loyalty to plaintiffs, and that by passively permitting what it was his duty to prevent, he committed a dishonest act within the meaning of the fidelity clause of the bond. The Court does not believe that plaintiffs' contention represents the law. "For an act to be 'dishonest' within the meaning of a fidelity suretyship bond, there must exist the element of moral turpitude or want of integrity." Commercial Banking Corp. v. Indemnity Ins. Co., 1 F.R.D. 380, 382 (E.D. Pa. 1940). As another court stated this proposition, in order to show personal dishonesty within the meaning of a fidelity clause, there must be both "a want of integrity and an intentional breach of trust." United States Fidelity & Guaranty Co. v. Bank of Thorsby, 46 F.2d 950, 951 (5th Cir. 1931). In other words, there must exist a compelling sense of conscious wrong rather than a mere omission or act amounting to negligence. The latter, to the contrary, is the most that plaintiffs have been able to prove with regard to Guren's conduct.

As an alternative proposition, plaintiffs assert that even though their claim may be barred under clause (A), that they are still entitled to recover under clause (B) on the basis of Sekular's fraudulent conduct alone. Clause (B) is entitled "On Premises" losses, and this, most certainly, is plaintiffs' greatest hurdle, for from even a most cursory reading of that paragraph it is apparent that the instantly sustained loss is not indemnificatory under the provisions of that section. The segment of clause (B) that plaintiff does rely upon reads as follows: "Any loss of Property through * * * other fraudulent means * * * while the Property is (or is supposed to be) lodged or deposited within any

this transaction. Sekular caused Guren to believe that he was possessed of a substantial amount of money and that a check Sekular presented to Guren would be cleared up to the sum of $100,000, when presented for payment. On the day that the purchase in question was effected, Sekular unequivocally stated to Guren that the money was in the bank and the stock should be purchased. In truth, Sekular had no more than $200 in his account; the disparity between that figure and the one he stated to Guren cannot be explained away as a mistake. There is no doubt that Sekular was engaging in a fraudulent and dishonest scheme in an attempt to reap a windfall profit. However, although the fraud of Guren alone or Guren in consort with Sekular would give rise to a claim against defendant under clause (A), the fraud of Sekular alone is not enough to substantiate such a claim.

What of Guren's conduct? Plaintiffs' contentions proceed to outline a rather detailed scheme of fraud perpetrated upon Sade & Co. by Guren in collusion with Sekular. These contentions have already been summarily stated. There is no need for the Court to deal with them in any greater detail for plaintiffs have not proven by a fair preponderance of the evidence that Guren was a party to any fraudulent or dishonest scheme. Instead, the implication is clear that Guren, himself, was duped and defrauded by his former friend's protestations of newly acquired wealth. It may be that Guren acted carelessly in accepting such a large order without first checking on Sekular's financial worth, but his carelessness was certainly no greater than that of Leo Sade, a man of infinitely greater experience in the stock brokerage business, who admitted that he knew of this order prior to its execution, yet took no precautions to check on Sekular's financial ability. 3/ The Court

---

3/ The order was for an amount up to $100,000; Guren had only acted as a registered representative for a relatively short period of time; Sekular had never traded with Sade & Co. before. Despite confrontation with these uncontroverted facts, Leo Sade insisted to the Court that such a transaction is not unusual and that under these circumstances it is not the custom of Sade & Co. to take the precaution of a phone call to the prospective customer's bank. Such a method of doing business strikes the Court as inconceivable.

cannot engage in speculation when dealing with an accusation of fraud and dishonesty; it must be substantiated by evidence, and plaintiff has not sustained its burden of proof on this issue. And, of course, relevant to the charge against Guren is the fact that an unsucessful attempt was made to initiate prosecution against him by the United States Attorney's office.

But plaintiffs further insist that they may still recover under clause (A) because Guren, being plaintiffs' agent, owed a fiduciary duty of trust, good faith and loyalty to plaintiffs, and that by passively permitting what it was his duty to prevent, he committed a dishonest act within the meaning of the fidelity clause of the bond. The Court does not believe that plaintiffs' contention represents the law. "For an act to be 'dishonest' within the meaning of a fidelity suretyship bond, there must exist the element of moral turpitude or want of integrity." Commercial Banking Corp. v. Indemnity Ins. Co., 1 F.R.D. 380, 382 (E.D. Pa. 1940). As another court stated this proposition, in order to show personal dishonesty within the meaning of a fidelity clause, there must be both "a want of integrity and an intentional breach of trust." United States Fidelity & Guaranty Co. v. Bank of Thorsby, 46 F.2d 950, 951 (5th Cir. 1931). In other words, there must exist a compelling sense of conscious wrong rather than a mere omission or act amounting to negligence. The latter, to the contrary, is the most that plaintiffs have been able to prove with regard to Guren's conduct.

As an alternative proposition, plaintiffs assert that even though their claim may be barred under clause (A), that they are still entitled to recover under clause (B) on the basis of Sekular's fraudulent conduct alone. Clause (B) is entitled "On Premises" losses, and this, most certainly, is plaintiffs' greatest hurdle, for from even a most cursory reading of that paragraph it is apparent that the instantly sustained loss is not indemnificatory under the provisions of that section. The segment of clause (B) that plaintiff does rely upon reads as follows: "Any loss of Property through * * * other fraudulent means * * * while the Property is (or is supposed to be) lodged or deposited within any

offices or premises located anywhere." What is intended by the expression "on premise loss" is apparent from the acts specifically included in clause (B). These are robbery, burglary, larceny, theft, holdup, misplacement, unexplained disappearance, damage or destruction, abstraction or removal from the custody or control of the insured, and loss of subscription, conversion, redemption or deposit privileges through the misplacement or loss of property, while on the insured's premises. Section (B) of the bond, as this Court interprets it, is an agreement to indemnify plaintiffs for the theft or its equivalent, of certain "property" as defined in the bond, and is not to be broadened by the clause "or other fraudulent means," so as to include every loss resulting from fraud.

In support of its assertion that they are entitled to indemnification under clause (B), plaintiffs rely upon Fidelity and Casualty Co. of N. Y. v. Bank of Altenburg, 216 F.2d 294 (8th Cir. 1954) and National Bank of Paulding v. Fidelity and Casualty Co., 131 F. Supp. 121 (S.D. Ohio 1954). It is significant to note that in each of these cases where recovery was allowed for the loss of "Property" abstracted by false pretenses from the premises of the insured, the insured was a bank and not a stock broker; that the transaction grew out of a "check kiting" scheme whereby upon deposit of a check with the bank, credit was granted and checks thereupon drawn on the insured bank to its detriment; hence, as each court noted, money was withdrawn from the bank, thereby resulting in a loss of property from "on premises." Sekular, of course, never withdrew any property from the premises of Sade & Co.

Plaintiffs contend that the language of section (B) when read with the definition of "Property" contained in the bond is somewhat confusing and doubtful. Therefore, under the rule of law that where there exists doubt as to the construction of a bond or other insurance policy, that doubt is to be resolved in favor of the insured, plaintiffs assert that they must still prevail. The Court is well aware of the fact that the term "Blanket Bond" indicates that coverage is to be wide and that it

is not unfair to interpret the document in this fashion. Fidelity Trust Co. v. American Surety Co. of N. Y., 268 F.2d 805 (3d Cir. 1959). At the same time, this canon of law "furnishes no warrant for avoiding hard consequences by imputing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, * * * forcing from plain words unusual and unnatural meanings." Bergholm v. Peoria Life Ins. Co., 284 U.S. 489, 492 (1932). This Court is of the opinion that the construction it applies to clause (B) of the bond is the only possible one without reading into the policy language which is not there.

Even assuming arguendo that the claimed loss were ostensibly included under clause (B) of the bond, plaintiffs would still not be entitled to indemnification, for the loss they sustained is one specifically excluded from coverage under the policy. Section 1(g) of the National bond excludes from coverage "any loss resulting directly or indirectly from trading, with or without the knowledge of the Insured, in the name of the Insured or otherwise, whether or not represented by any indebtedness or balance shown to be due the Insured on any customer's account, actual or fictitious, except when covered under Insuring Clause (A), (D) or (E)." In construing this section of the bond -- the "trading loss" provision -- plaintiffs assert that the term "trading" has a special connotation in the securities business; that trading means purchase and sale for a gain by a dealer, for its own profit and in its own name; that this type transaction must be distinguished from the transaction in the instant case, where a purchase was made for a customer's account, called an investment account, for a commission, and that it is the former rather than the latter concept that was intended in this bond provision. The defendant, on the other hand, contends that the term "trading" as used in the National bond includes the ordinary operation of buying and selling stocks for customers. It is defendant's position that a trading loss provision in a broker's bond is a usual and necessary provision, for otherwise the door would be wide open for any stock brokerage firm

to engage in, and to permit limitless transactions upon scanty or no credit investigation with absolute assurance that if the customer were unworthy, the bonding company would nevertheless be a guarantor of the transaction.

The Court recognizes the existence of a technical distinction between a trader and a broker. However, it interprets the word "trading" as used in the National policy indemnifying plaintiffs against certain losses with the exception of those "resulting directly or indirectly from trading" as not having the restricted meaning for which plaintiffs contend, but the same meaning it has in any mercantile business, namely, the buying and selling of commodities -- in the instant case, the buying and selling of securities on a customer's account. cf., Harris v. National Surety Co., 258 Mass. 353, 155 N.E. 10, 11 (1927).

In the final analysis it is clear that what has occurred in this case is the following: plaintiffs' employee, Guren, with the knowledge of plaintiffs, accepted a customer's order to purchase a substantial amount of stock for which the customer lodged with plaintiffs' employee a check which, when thereafter deposited, was dishonored. The only element that distinguishes this purchase transaction from all the thousands of others that plaintiffs execute each year is the fact that the customer, Sekular, issued a "NSF" check in payment for said stock. Therefore, if plaintiffs' contention as to the scope of coverage under clause (B) as well as the meaning of the term "trading loss" were followed, the Court would be in the position of saying to defendant that for a premium of between four and five hundred dollars per year you are hereby deemed to be an unqualified indorser on each and every check [4/] issued to plaintiffs, up to the amount of $30,000. As plaintiffs'

[4/] 22 D.C. Code 1410 (1961): "As against the maker * * * thereof the making of a check * * * which is refused by the drawee because of insufficient funds * * * shall be prima facie evidence of the intent to defraud and of knowledge of insufficient funds in or credit with such bank" unless the check is made good within five days of receiving notice, ergo, National would be a guarantor of all checks issued to plaintiffs, not just those where a specific intent to defraud could be shown.

own witness testified, no insurance company could remain in business very long if it underwrote that type of coverage for a premium of four to five hundred dollars per year.

Defendant cites a series of cases for the proposition that the Court should interpret the term "trading loss" broadly, rather than in any particularized manner. These cases are not on point for the reason that they deal with employee dishonesty and a somewht dissimilar bond provision. However, to a certain degree they corroborate the Court's conclusion that the term "trading loss" was not herein employed in a technical sense. See, generally, Earl v. Fidelity & Deposit Co., 138 Cal. App. 435, 32 P.2d 409 (1934); Rath v. Indemnity Ins. Co., 2 Cal. App. 2d 637, 38 P.2d 435 (1934); Kean v. Maryland Gas. Co., 221 App. Div. 184, 223 N.Y.S. 373 (1927); Harris v. National Surety Co., 258 Mass. 353, 155 N.E. 10 (1927).

The Court finds that plaintiffs are not entitled to recover from defendant under said bond.

Let this memorandum be considered Findings of Fact and Conclusions of Law.

/s/ LUTHER W. YOUNGDAHL
United States District Judge

Dated: April 17, 1962

[Filed May 1, 1962]

FINAL JUDGMENT DISMISSING PLAINTIFFS' COMPLAINT UPON THE MERITS

This matter having come before the Court for hearing and determination upon the merits, upon the pleadings heretofore filed herein, the testimony and evidence offered and received, argument of counsel, oral and written, and having been duly considered by the Court, and the Court having heretofore on April 17, 1962, filed with the Clerk of this Court its Memorandum Opinion as and for its Findings of Fact

and Conclusions of Law in disposition of this cause, it is now, this 30th day of April, 1962, by the Court

ADJUDGED, ORDERED AND DECREED that plaintiffs' complaint herein be and the same hereby is dismissed upon its merits and the defendant herein is hereby awarded judgment against plaintiffs for defendant's costs herein.

/s/ Luther W. Youngdahl
Judge

* * *

[Filed May 10, 1962]

PLAINTIFFS MOTION FOR NEW TRIAL

Plaintiffs hereby move this honorable court to grant a new trial, and in support thereof rely upon the affidavit of plaintiffs' counsel and memorandum of Points and Authorities, attached hereto.

/s/ Lloyd J. Derrickson, Esq.

/s/ Frank J. Wilson, Esq.
Attorneys for Plaintiffs

* * *

Dated: May 10, 1962

[Filed May 10, 1962]

AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION FOR NEW TRIAL

Lloyd J. Derrickson deposes and says that although Plaintiffs diligently attempted to produce Stanley Sekular and Ann Lewis (Sekular) as witnesses, they were unable to be found. The record reflects defendants conceded this to be the case.

It is now established that one of these witnesses, at least, has returned to the jurisdiction and that the other may be and probably is

in the jurisdiction of this court.

Plaintiffs request that a new trial be granted so that these parties may be produced as witnesses whose testimony is of the utmost importance. Further, so that plaintiffs may produce the two assistant United States Attorneys who processed the complaint made to them concerning the subject matter of suit since their testimony has a direct and important bearing upon the issues.

/s/ Lloyd J. Derrickson, Esq.

* * *

[JURAT dated May 10, 1962]

[Filed May 16, 1962]

PLAINTIFFS SUPPLEMENTAL MOTION FOR NEW TRIAL

Plaintiffs file this supplement in order to correct the statements made by defendants counsel that there was no excuse for failure to produce witnesses and that no error is claimed because new evidence is available and plaintiffs do claim error in the disposition of this action. In support thereof, plaintiffs aver as follows:

1. Plaintiffs diligently attempted to take depositions of the witnesses Sekular, man and wife but were unable to do so because their counsel refused to allow them to, on the ground of marital privilege. Before and at trial, both of these persons could not be found; after diligent search it was reported that at least one witness was out of the country. It has now been ascertained that these parties are divorced and it is plaintiffs belief that the testimony of the divorced wife will be admissable and have material bearing upon the issues in litigation.

2. The testimony of the Assistant U. S. Attorneys will be of material bearing in respect to the testimony of the divorced Sekulars since their positions in this matter and that of S. Thomas Guren, have been conflicting and at variance, since the ex-Mrs. Sekular has implicated

S. Thomas Guren, and his fraudulent activities, if proved, would allow plaintiffs to recover.

3. It is believed that the court should hear this testimony in order to have a complete record, not heretofore available through no fault of plaintiffs.

/s/ Lloyd J. Derrickson

/s/ Frank J. Wilson
Attorneys for Plaintiffs

* * *

Dated: May 15, 1962

[Filed May 16, 1962]

OPPOSITION TO PLAINTIFFS' MOTION FOR NEW TRIAL

Comes now the defendant herein and opposes plaintiffs' motion for a new trial herein and in support of said opposition avers as follows:

1. This suit was filed in March, 1960, and reached for trial in December, 1961. In the nearly two years interval during which the cause was pending no effort was made by plaintiffs to take the deposition of either witness whom they could not later find. No excuse is made for this failure.

2. At the time of trial a statement and affidavit of Anne Lewis (Sekular) was alluded to, referred to, and made the subject of cross-examination of Thomas Guren. Furthermore substance of the statements was again relied upon by plaintiffs on page 6 of their brief to the Court.

3. Absolutely no justification or excuse is provided for failure of the plaintiffs to have produced as their witnesses two (unnamed) Assistant United States Attorneys "who processed the complaint to them concerning the subject matter of this suit." The record discloses that the defendant had subpoenaed three Assistant United States Attorneys,

Messrs. Daly, Greenhalgh and Dunie (since separated) but when the substance of the hearings held before any of them was not contradicted by any other witness, defendant never called them to the stand since their testimony would have only been cumulative.

4. It is apparent that plaintiffs' motion is without substance. It claims no error whatever in the trial and disposition of the action up to the present time; it alleges no newly discovered evidence; nor does it even reasonably justify the failure to have had witnesses present whose testimony was allegedly "of the utmost importance." How such testimony would be of any importance and what direct and important bearing upon the issues the testimony would have is left to pure conjecture in plaintiffs' motion and counsel's supporting affidavit.

It is respectfully submitted that plaintiffs' motion should be denied.

WHITEFORD, HART, CARMODY & WILSON

/s/ Harry L. Ryan, Jr.
Attorneys for Defendant

[Certificate of Service]

[Filed May 23, 1962]

MEMORANDUM AND ORDER

Plaintiffs have made a motion for new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. In their affidavit of counsel in support of said motion, plaintiffs assert they are now able to produce one of two witnesses that they were unable to locate at the time of the trial of this cause of action. Plaintiffs further assert they should also like to present the testimony of "two assistant United States Attorneys who processed the complaint made to them concerning the subject matter of [this] suit."

This action was commenced in March, 1960, first tried in December, 1961, and a supplementary hearing held in March, 1962. During that two-year period plaintiffs failed to obtain the deposition of

either witness whom they could not later locate. Plaintiffs now claim that opposing counsel refused to allow plaintiffs to take said depositions on the ground of marital privilege. If this was the situation, and if counsel's contention was specious, plaintiffs certainly had ample opportunity to apply for a court order under the Federal Rules and thus determine that issue. Plaintiffs had more than a fair amount of time to prepare their claim for trial. The interests of the parties concerned, as well as this Court, demand a reasonable conclusion to all litigation.

Plaintiffs further desire another trial in order to present the testimony of the two Assistant United States Attorneys. No excuse is offered for the failure to produce their testimony at the time of the original trial, nor are there any circumstances indicating that the two United States Attorneys were not then available.

The Court believes that all parties to this action have had a full and fair opportunity to present their case. Despite the fact that the unsworn affidavit of Anne Lewis Sekular was hearsay, the Court allowed cross-examination of Thomas Guren as to the charges contained therein, and plaintiffs again asserted these matters in their post-trial memorandum. Plaintiffs do not claim any error at trial or in the Court's disposition of this suit. They allege no newly discovered evidence. In effect, plaintiffs claim is without substance and therefore must be denied.

WHEREFORE, it is by the Court this 24th day of May, 1962,

ORDERED that plaintiffs' motion for new trial is hereby denied.

/s/ LUTHER W. YOUNGDAHL
U. S. District Judge

[Filed June 22, 1962]

NOTICE OF APPEAL

Notice is hereby given that Leo Sade, et al, plaintiffs above named, hereby appeal to the United States Court of Appeals for the District of Columbia from the final judgment dismissing plaintiffs' complaint upon the merits and awarding judgment for costs entered in this action on May 1, 1962, and from the Order denying plaintiffs motion for a new trial, dated May 24, 1962.

/s/ Lloyd J. Derrickson, Esq.

/s/ Frank J. Wilson, Esq.
Attorneys for Plaintiffs

* * *

Certificate of Service

PLAINTIFF'S EXHIBIT 34

NATIONAL SURETY CORPORATION
(A Member of The FUND Insurance Companies, New York)

BROKERS BLANKET BOND
Standard Form No. 14
(Consolidated Form)

In consideration of an agreed premium, NATIONAL SURETY CORPORATION, a corporation of the State of New York, with its Home Office in the City of New York, hereinafter referred to as Underwriter, hereby undertakes and agrees to indemnify and hold harmless SADE & CO., Washington, D.C., hereinafter referred to as Insured to an amount not exceeding Fifty Thousand Dollars ~~($50,000.00)~~ 30,000, from and against any losses sustained and discovered as hereinafter set forth.

DEFINITION OF PROPERTY

Wherever used in this bond Property shall be deemed to mean money, currency, coin, bank notes, Federal Reserve notes, postage and revenue stamps, U. S. Savings Stamps, bullion, precious metals of all kinds and in any form and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semi-precious stones, bonds, securities, evidences of debts, debentures, scrip, certificates, interim receipts, warrants, rights, puts, calls, straddles, spreads, transfers, coupons, drafts, bills of exchange, acceptances, notes, checks, money orders, warehouse receipts, bills of lading, withdrawal orders, conditional sales contracts, abstracts of title, insurance policies, deeds, mortgages upon real estate and/or upon chattels and upon interests therein, and assignments of such policies, mortgages and instruments, and other valuable papers and documents, and all other instruments similar to or in the nature of the foregoing, in which the Insured has an interest or which are held by the Insured for any purpose or in any capacity and whether so held gratuitously or not and whether or not the Insured is liable therefor.

DEFINITION OF EMPLOYEES

Wherever used in this bond Employee and Employees shall be deemed to mean, respectively, one or more of the officers, clerks and

other employees while employed by the Insured during the currency of this bond, and wherever located, and Guest Students pursuing their studies or duties in any of the Insured's offices.

THE LOSSES COVERED BY THIS BOND ARE AS FOLLOWS:

FIDELITY

(A) Any loss through any dishonest, fraudulent or criminal act of any of the Employees, committed anywhere and whether committed alone or in collusion with others, including loss of Property through any such act of any of the Employees.

ON PREMISES

(B) Any loss of Property through robbery, burglary, common-law or statutory larceny, theft, hold-up, or other fraudulent means, misplacement, mysterious unexplainable disappearance, damage or destruction, abstraction or removal from the possession, custody or control of the Insured (whether effected with or without violence or with or without negligence on the part of any Employee), and any loss of subscription, conversion, redemption or deposit privileges through the misplacement or loss of Property, while the Property is (or is supposed to be) lodged or deposited within any offices or premises located anywhere, except while in the mail or in any of the Insured's offices specifically excluded from the coverage of this bond or with a carrier for hire other than an armored motor vehicle company for the purpose of transportation.

Offices and Equipment

Any loss of furnishings, fixtures or equipment in any of the Insured's offices covered under this bond, or any loss through damage to any such office and to the furnishings, fixtures or equipment therein, in either case caused by larceny or theft in, or by burglary, robbery or hold-up of, such office, or attempt thereat, or by vandalism or malicious mischief, provided that the Insured is the owner of such offices, furnishings, fixtures or equipment or is liable for such loss or damage, -- always excepting, however, all loss or damage through fire.

IN TRANSIT

(C) Any loss of Property (occurring with or without negligence) through robbery, common-law or statutory larceny, embezzlement, theft, misappropriation, hold-up, misplacement, mysterious unexplainable disappearance, being lost or otherwise made away with, damage or destruction, and any loss of subscription, conversion, redemption or deposit privileges through the misplacement or loss of Property, while the Property is in transit anywhere in the custody of any of the Employees or of any other person acting as messenger, except while in the mail or with a carrier for hire other than an armored motor vehicle company for the purpose of transportation, such transit to begin immediately upon receipt of such Property by the transporting Employee or such other person, and to end immediately upon the delivery thereof at destination.

FORGERY OR ALTERATION

(D) Any loss through FORGERY OR ALTERATION of, on, or in any bills of exchange, checks, drafts, acceptances, certificates of deposit, promissory notes, or other written promises, orders or directions to pay sums certain in money, due bills, money orders, warrants, orders upon public treasuries, letters of credit, written instructions or advices directed to the Insured, authorizing or acknowledging the transfer, payment, delivery or receipt of funds or Property, which instructions or advices purport to have been signed or endorsed by any customer of the Insured or by any banking institution or stockbroker but which instructions or advices either bear the forged signature or endorsement or have been altered without the knowledge and consent of such customer, banking institution of stockbroker, withdrawal orders or receipts for the withdrawal of funds or Property, or receipts or certificates of deposit for Property and bearing the name of the Insured as issuer, excluding, however, coupon and serial notes, bonds, scrip, debentures and obligations of a similar nature, whether registered or unregistered, and coupons attached thereto or detached therefrom.

Any check or draft (a) made payable to a fictitious payee and endorsed in the name of such fictitious payee or (b) procured in a face to face transaction with the maker or drawer thereof or with one acting as agent of such maker or drawer by anyone impersonating another and made or drawn payable to the one so impersonated and endorsed by anyone other than the one impersonated, shall be deemed to be forged as to such endorsement .

Mechanically reproduced facsimile signatures are treated the same as handwritten signatures.

SECURITIES

(E) Any loss sustained by the Insured, including loss sustained by reason of liability imposed upon the Insured by law or by the constitution, rules or regulations of any Stock Exchange of which the Insured is a member or which would have been imposed upon the Insured by the constitution, rules or regulations of any Stock Exchange if the Insured had been a member thereof, through having, in good faith and in the ordinary course of business, whether for its own account or for the account of others in any representative, fiduciary, agency or any other capacity, either gratuitously or otherwise, purchased or otherwise acquired, accepted or received, or sold or delivered, or given any value, extended any credit or assumed any liability, on the faith of, or otherwise acted upon any securities, obligations, or other written instruments which prove to have been forged, counterfeited, raised or otherwise altered, or lost or stolen, or through having, in good faith and in the ordinary course of business, guaranteed in writing or witnessed any signatures, whether for valuable consideration or not and whether or not such guaranteeing or witnessing is ultra vires the Insured, upon any transfers, assignments, bills of sale, powers of attorney, guarantees, endorsements or other documents upon or in connection with any securities, obligations or other written instruments and which pass or purport to pass title to such securities, obligations or other written instruments; EXCLUDING, however, in any event, any loss

through forgery or alteration of, on, or in any bills of exchange, checks, drafts, acceptances, certificates of deposit, promissory notes, or other written promises, orders or directions to pay sums certain in money, due bills, money orders, warrants, orders upon public treasuries, letters of credit, written instructions or advices directed to the insured, authorizing or acknowledging the transfer, payment, delivery or receipt of funds or Property, which instructions or advices purport to have been signed or endorsed by any customer of the insured or by any banking institution or stockbroker but which instructions or advices either bear the forged signature or endorsement or have been altered without the knowledge and consent of such customer, banking institution or stockbroker, withdrawal orders or receipts for the withdrawal of funds or Property, or receipts or certificates of deposit for Property and bearing the name of the Insured as issuer.

Mechanically reproduced facsimile signatures are treated the same as handwritten signatures.

COURT COSTS AND ATTORNEYS' FEES

(Applicable to all Insuring Clauses now or hereafter forming part of this bond)

The Underwriter will indemnify the Insured against court costs and reasonable attorneys' fees incurred and paid by the Insured in defending any suit or legal proceeding brought against the Insured to enforce the Insured's liability or alleged liability on account of any loss, claim or damage which, if established against the Insured, would constitute a valid and collectible loss sustained by the Insured under the terms of this bond. Such indemnity shall be in addition to the amount of this bond. In consideration of such indemnity, the Insured shall promptly give notice to the Underwriter of the institution of any such suit or legal proceeding; at the request of the Underwriter shall furnish it with copies of all pleadings and other papers therein; and at the Underwtiter's election shall permit the Underwriter to conduct the defense of such suit or legal proceeding, in the Insued's name, through attorney's of the Underwriter's own selection. In the event of such election

by the Underwriter, the Insured shall give all reasonable information and assistance, other than pecuniary, which the Underwriter shall deem necessary to the proper defense of such suit or legal proceeding.

THE LOSSES COVERED BY THIS BOND ARE THOSE SUSTAINED AND DISCOVERED AS FOLLOWS:

1. Losses sustained by the Insured after noon of the date hereof and while this bond is in force.

2. Losses sustained by the Insured at any time before the termination or cancelation of this bond as an entirety, which would have been recoverable under the coverage of any other insurance carried by the Insured or any predecessor in interest of the Insured and giving some or all of the coverage afforded under the Insuring Clause of this bond applicable to such losses, had such other insurance given all the coverage afforded under such Insuring Clause of this bond: PROVIDED, with respect to losses covered by this paragraph, that

(a) the applicable coverage of this bond is substituted, on or after noon of the date of this bond, for the coverage given by such other insurance and the Insured or such predecessor, as the case may be, carried such coverage continuously from the time such losses are sustained to the date and hour the coverage of this bond is substituted therefor, and

(b) such coverage in force at the time such losses are sustained gave some or all of the coverage afforded under the Insuring Clause of this bond applicable to such losses, and

(c) at the time of discovery of such losses, the period for discovery of loss under all bonds and policies of insurance which afford coverage applicable to such losses and for which the coverage of this bond is substituted, has expired, and

(d) if the applicable amount of this bond is larger than the amount of coverage under any other insurance carried by the Insured or such predecessor, as the case may be, and in force at the time such losses are sustained, and giving some or all of the coverage afforded under the Insuring Clause of this bond applicable

to such losses, then liability hereunder for such losses shall not exceed the smaller amount.

3. Losses referred to in paragraphs 1 and 2 immediately preceding must be discovered by the Insured prior to the expiration of twelve months after the termination or cancelation of this bond as an entirety, as hereinafter set forth, or by mutual agreement.

OFFICES COVERED

The offices of the Insured covered under this bond are

(a) all of its offices, established or to be established, which are located in the United States of America and Dominion of Canada, and

(b) the office or offices of the Insured outside the United States of America and Dominion of Canada and located as follows:

ADDITIONAL OFFICES

No notice to the Underwriter of an increase during any premium period in the number of the Insured's offices located in the United States of America or Dominion of Canada, or in the number of Employees at any of the offices covered under this bond, need be given and no additional premium need be paid for the remainder of such premium period unless such increase shall result from the merger or combination with the Insured of another firm.

If the Insured shall give to the Underwriter notice that it desires covered under this bond any office located outside the United States of America and Dominion of Canada, and not specified above, then, if the Underwriter shall give its written consent thereto, such office shall be covered under this bond on and after the date specified in such notice and an additional premium shall be paid.

THE FOREGOING AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS AND LIMITATIONS:

Section 1. THIS BOND DOES NOT COVER:

(a) Any loss effected directly or indirectly by means of forgery, except when covered by Insuring Clause (A), (D), or (E).

(b) Any loss due to riot or civil commotion outside the United States of America and Dominion of Canada or due to military, naval or

usurped power, war or insurrection wherever occurring unless such loss occurs in transit in the circumstances recited in Insuring Clause (C) and unless, when such transit was initiated, there was no knowledge of such riot, civil commotion, military, naval or usurped power, war or insurrection on the part of any person acting for the Insured in initiating such transit; or any loss due to hurricane, cyclone, tornado, earthquake, volcanic eruption or similar disturbance of nature.

(c) Any loss resulting directly or indirectly from the act or acts of any person who is a member of the Board of Directors of the Insured or a member of any equivalent body by whatsoever name known unless such person is also an Employee or an elected official of the Insured in some other capacity, nor, in any event, any loss resulting directly or indirectly from the act or acts of any person while acting in the capacity of a member of such Board or equivalent body; or any loss resulting directly or indirectly from any dishonest, fraudulent or criminal act or acts of any partner of the Insured.

(d) Any loss the result of any loan made by the Insured or by any of the Employees, whether authorized or unauthorized, except when covered under Insuring Clause (A), (D) or (E).

(e) And loss of Property contained in customers' safe deposit boxes unless such loss be sustained through any dishonest, fraudulent or criminal act of an identifiable Employee under such circumstances as shall make the Insured legally liable therefor.

(f) Any loss of Property or any loss of privileges through the misplacement or loss of Property as set forth in Insuring Clause (C) while the Property is in transit in the custody of any armored motor vehicle company, unless such loss shall be in excess of the amount recovered or received by the Insured under (a) the Insured's contract with said armored motor vehicle company, (b) insurance carried by said armored motor vehicle company for the benefit of users of its service, and (c) all other insurance and indemnity in force in whatsoever form carried by or for the benefit of users of said armored motor vehicle company's service, and then this bond shall cover only such excess.

(g) Any loss resulting directly or indirectly from trading, with or without the knowledge of the Insured, in the name of the Insured or otherwise, whether or not represented by any indebtedness or balance shown to be due the Insured on any customer's account, actual or fictitious, except when covered under Insuring Clause (A), (D), or (E).

Section 2. WARRANTY

No statement made by or on behalf of the Insured, whether contained in the application or otherwise, shall be deemed to be a warranty of anything except that it is true to the best of the knowledge and belief of the person making the statement.

Section 3. LOSS -- NOTICE -- PROOF -- LEGAL PROCEEDINGS

The Insured shall give to the Underwriter written notice of any loss under this bond as soon as possible after the Insured shall learn of such loss, and within ninety days after learning of such loss shall file with the Underwriter an itemized proof of claim duly sworn to. The Underwriter shall have thirty days after notice and proof of loss within which to investigate the claim, but where the loss is clear and undisputed, settlement shall be made within forty-eight hours; and this shall apply notwithstanding the loss is made up wholly or in part of securities of which duplicates may be obtained. No action or proceeding shall be brought under this bond in regard to any loan, unless begun within twenty-four months after the Insured shall learn of such loss, except that any action or proceeding to recover hereunder on account of any judgment against the Insured in any suit mentioned in the paragraph entitled Court Costs and Attorneys' Fees, or to recover attorneys' fees paid in any such suit, shall be begun within twenty-four months from the date upon which the judgment in such suit shall become final, or in case such limitation be void under the law of the place governing the construction hereof, then within the shortest period of limitation permitted by such law.

Section 4.. VALUATION . Securities

The value of any securities, for the loss of which claim shall be made under this bond, shall be determined by the cost of an equivalent amount of securities of the same issue purchased by or at the instance of the Underwriter; provided, however, that if, prior to such purchase by or of the instance of the Underwriter, the Insured shall be compelled, by the demands of a third party or by market rules, to assume the cost of an equivalent amount of securities of the same issue, and shall notify the Underwriter, in writing, of such compulsion, such cost shall be taken as the value of such securities. The amount of the Insured's claim on account of any such loss shall be deemed to be the cost of such securities as herein determined. In case of a loss of subscription, conversion, redemption, or deposit privileges as above set forth, the amount of such loss shall be the value of such privileges immediately preceding the expiration thereof. If any securities for the loss of which claim shall be made under this bond cannot be replaced or have no quoted market value, or if such subscription, conversion, redemption or deposit privileges have no quoted market value, their value shall be determined by agreement or arbitration. Any loss sustained under this bond of money, currency or funds of any country shall be paid in the United States of America dollar equivalent of the money, currency or funds of such country. Any other loss sustained at any of the Insured's offices covered under this bond and payable in money shall be paid in the United States of America dollar equivalent of the money, currency or funds of the country in which such office is located. Any foreign exchange loss for which claim shall be made under this bond shall be determined by the average rate of exchange on the day preceding the discovery of such loss.

Property Other Than Securities

In the case of any loss of or damage to any Property, other than securities, or damage to the Insured's offices covered under this bond, or loss of or damage to the furnishings, fixtures or equipment therein,

the Underwriter shall not be liable for more than the actual cash value of such Property, or of such furnishings, fixtures or equipment or for more than the actual cost of repairing such Property or offices, furnishings, fixtures or equipment or of replacing same with property or material of like quality and value. The Underwriter may, at its election, pay such actual cash value, or make such repairs or replacements.

Section 5. SALVAGE

In case of recovery, whether made by the Insured or the Underwriter, on account of any loss coming within the coverage of this bond, from any source other than insurance, suretyship, indemnity or reinsurance, the net amount of such recovery, after deducting the actual cost and expense of making same, shall be applied, if such recovery be made before payment by the Underwriter, as follows: if such loss be in excess of the amount of this bond plus the amount of the insurance of any co-insurers of the Underwriter and plus the amount of any deductible (i. e., the amount over which this bond is written as excess, or that part of any loss or losses which must be deducted before insurance under this bond applies) and of any underlying insurance or suretyship, then such net recovery shall be applied to such excess in reduction of the loss of the Insured and the balance, if any, shall be applied to that part of such loss for which the Underwriter and its co-insurers, if any, are liable; or if there be no such excess loss, then such net recovery shall be applied to that part of such loss for which the Underwriter and its co-insurers, if any, are liable. If such recovery be made after payment by the Underwriter, then such net recovery shall be applied as follows: if there be any such excess loss, then such net recovery shall be applied to such excess, and the balance, if any, shall be applied to the reimbursement of the Underwriter and its co-insurers, if any, proportionately; or if there be no such excess loss, such net recovery shall be applied to the reimbursement of the Underwriter and its co-insurers, if any, proportionately. The Insured shall execute all necessary papers to secure to the Underwriter the rights herein provided for.

Section 6. NON-REDUCTION OF LIABILITY

Payment of loss under this bond shall not reduce the liability of the Underwriter under this bond for other losses whenever sustained; PROVIDED, however, that the total liability of the Underwriter under this bond on account of (a) any loss or losses caused by any one act of burglary, robbery or hold-up, or attempt thereat, in which no Employee is concerned or implicated, or (b) any loss or losses with respect to any one unintentional or negligent act or omission on the part of any person (whether one of the Employees or not) resulting in damage to or destruction or misplacement of Property, or (c) any loss or losses, in which no Employee is dishonestly implicated, which are covered by Insuring Clause (E) of this bond, and which result from any one act performed by the Insured, or (d) any loss or losses other than those specified in (a), (b) and (c) preceding, caused by acts or omissions of any person (whether one of the Employees or not) or acts or omissions in which such person is concerned or implicated, or (e) any loss or losses with respect to any one casualty or event, is limited to the sum above stated in the opening paragraph of this bond irrespective of the total amount of such loss or losses.

Section 7. NON-ACCUMULATION OF LIABILITY

Regardless of the number of years this bond shall continue in force and the number of premiums which shall be payable or paid, the liability of the Underwriter under this bond with respect to any loss or losses specified in the PROVIDED clause of Section 6 of this bond shall not be cumulative in amounts from year to year or from period to period.

Section 8. LIMIT OF LIABILITY UNDER THIS BOND AND PRIOR INSURANCE

With respect to loss or losses set forth in sub-section (d) of the PROVIDED clause of Section 6 of this bond which occur partly during the period of this bond and partly during the period of other bonds or policies issued by the Underwriter to the Insured or to any predecessor in interest of the Insured and terminated or canceled or allowed to expire

and in which the period for discovery has not expired at the time any such loss or losses thereunder are discovered, the total liability of the Underwriter under this bond and under such other bonds or policies shall not exceed, in the aggregate, the amount carried hereunder on such loss or losses or the amount available to the Insured under such other bonds or policies, as limited by the terms and conditions thereof, for any such loss or losses, if the latter amount be the larger.

Section 9. OTHER INSURANCE OR INDEMNITY

If the Insured carries or holds any other insurance or indemnity covering any loss or losses covered by this bond, the Underwriter shall be liable hereunder only for that part of such loss or losses which is in excess of the amount recoverable or recovered from such other insurance or indemnity. In no event shall the Underwriter be liable for more than the amount of the coverage of this bond applicable to such loss or losses; subject, nevertheless, to Section 6 of this bond.

Section 10. TERMINATION

This bond shall terminate in its entirety – (a) at noon upon the effective date specified in a written notice served by the Underwriter upon the Insured,or sent by mail, and such date, if the notice be served, shall be not less than thirty days after such service, or, if sent by mail, not less than thirty-five days after the date of mailing, or (b) upon the receipt by the Underwriter of a written request from the Insured to terminate this bond, or (c) immediately upon the taking over of the Insured by a receiver or other liquidator or by State or Federal officials, or (d) immediately upon the taking over of the Insured by another firm. The mailing or notice by the Underwriter, as aforesaid, to the Insured at its principal office, shall be sufficient proof of notice. The Underwriter, on request, shall refund to the Insured the unearned premium computed pro rata if this bond be terminated at the instance of the Underwriter or if terminated as provided in sub-section (c) or (d) of this paragraph and at short rates if terminated or reduced at the instance of the Insured.

This bond shall terminate as to any Employee -- (a) immediately upon discovery by the Insured of any dishonest or fraudulent act on the

part of such Employee, without prejudice to the loss of any Property then in transit in the custody of such Employee, or (b) at noon upon the effective date specified in a written notice served upon the Insured or sent by mail, and such date, if the notice be served, shall be not less than fifteen days after such service, or, if sent by mail, not less than twenty days after the date of mailing. The mailing by the Underwriter of notice, as aforesaid, to the Insured at its principal office shall be sufficient proof of notice.

RIDERS

SECTION II.

The liability of the Underwriter hereunder is subject to the terms and conditions of the following Riders attached hereto:

Discovery	- 23487
Counterfeit Currency Insuring Clause	- 23103
Books and Records	- 23233
Partial E	- 23436
Delete Insuring Clause D	- 23499
Amending	- 23451

The Insured by the acceptance of this bond, gives notice to the Underwriter terminating or canceling prior bond (a) No.(s)_____ _____ such termination or cancelation to be effective as of the time this bond becomes effective.

SIGNED, SEALED and DATED this 1st day of April, 1959.

NATIONAL SURETY CORPORATION

By_____
Attorney in Fact

and_____
Attorney in Fact

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,192

LEO SADE, et al.,

Appellants,

v.

NATIONAL SURETY CORPORATION,

Appellee.

Appeal From Final Judgment of the United States District Court
For the District of Columbia Dismissing Appellants' Complaint

---

HARRY L. RYAN, JR.
815 - 15th Street, N. W.
Washington 5, D. C.
Attorney for Appellee

STATEMENT OF QUESTIONS PRESENTED

1. Did the District Court err in rejecting a claim asserted by appellants against appellee under a BROKERS BLANKET BOND for an alleged loss by appellants of $18,476.69 sustained after a decline in the market upon stock purchased by extending credit to one not worthy thereof when that bond by its terms purported only to indemnify appellants against the loss of "Property" while the same was on, or was supposed to be on, the premises of the insured, and wherein "Property" was defined at length so as to include generally many items having intrinsic value or being evidences of debts, but which did not include indemnity against credit losses?

Appellee contends that the Court did not err.

2. Did the District Court err by permitting appellee, after a partial trial, to amend its answer to add a new defense thereto, when no prejudice is shown to have resulted to appellants thereby, and especially when appellants were thereafter permitted to meet such new defense and to offer without restriction, any evidence which they desired to offer, directed to such additional defense, and after which appellants did offer evidence directed to such defense?

Appellee contends that the Court acted within its discretion in so doing and did not err in thereby effecting substantial justice.

3. Did the Court err in denying appellant's motion for a new trial upon the claim of inability to have produced witnesses when the record is devoid of any real or substantial evidence of efforts to produce such witnesses, and when the substance of what they might have testified to was already before the Court sitting without a jury?

The Court answered each contention raised by appellants in their motion effectively, and evidenced no abuse of its discretion, and accordingly did not err.

INDEX

	Page
COUNTERSTATEMENT OF THE CASE	1
RULE INVOLVED	7
Federal Rules of Civil Procedure, Rule 15	7
SUMMARY OF ARGUMENT	8
ARGUMENT:	
I. No "On Premises" Loss of Any "Property" Covered By Appellee's Bond is Established in This Case (Coverage "B")	11
II. The Defense of "Trading Loss," Even Though Not Deemed Determinative by the Trial Court, Could as a Matter of Law Have Been Controlling and Dispositive of the Case, and Was Properly Permitted to be Pleaded and Considered	17
III. The Trial Court Did Not Err in Refusing to Grant Appellants a New Trial on Either Their Timely Motion Seeking the Same, or Upon Their Supplemental Motion	25
CONCLUSION	27

TABLE OF CASES

* Degener v. Hartford Accident & Indemnity Co., 92 F. 2d 959 (3rd Cir. 1937)	14
* Earl v. Fidelity & Deposit Co., 138 Cal. App. 435, 32 P. 2d 409 (1934)	20, 24
* Gallon v. Lloyd-Thomas Company, 264 F. 2d 821 (8th Cir. 1959)	19
Hall v. National Supply Company, 270 F. 2d 379, (5th Cir. 1959)	19
Harris v. National Surety Corporation, 258 Mass. 353, 155 N.E. 10, (1927)	10, 24
* Joyce v. L. P. Steuart, Inc., 277 F. 2d 407 (D. C. Cir. 1955)	19
* Kean v. Maryland Casualty Co., 221 App. Div. N.Y. 184 (1927) Affirmed 248 N.Y. 534 (1928)	22, 24

	Page
National Bank of Paulding v. Fidelity & Casualty Insurance Co., 131 F. Supp. 121 (S.D. Ohio, 1954)	13, 14
Paddleford v. Fidelity & Casualty Co. of N. Y., 100 F. 2d 606, (7th Cir. 1938)	15, 24
* Rath v. Indemnity Insurance Co. of North America, 2 Cal. App. 2d 637, 38 P. 2d 435 (1934)	22, 24
* Roth v. Maryland Casualty Co., 209 F. 2d 371 (3rd Cir. 1954)	24
Ruppert v. Ruppert, 77 U.S. App. D.C. 65, 134 F. 2d 497	26
Sade v. National Surety Co., 203 F. Supp. 680 (D.C. D.C. 1962)	16
Tillman v. National City Bank of New York, 118 F. 2d 631	19

RULE

Federal Rules of Civil Procedure, 15 (b)(c)	7, 8, 10, 18

---

* Cases principally relied upon by appellee.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,192

LEO SADE, et al.,

Appellants,

v.

NATIONAL SURETY CORPORATION,

Appellees.

Appeal From Final Judgment of the United States District Court
For the District of Columbia Dismissing Appellants' Complaint

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellee had issued and at the time of the pertinent events herein concerned had outstanding and in full force and effect its BROKERS BLANKET BOND [1] indemnifying and saving appellants harmless against certain losses specified therein.

---

[1] Capitalization herein follows that in the Bond itself.

Those provisions in the order in which the same appear in the bond are as follows (J.A. 144-157, Pl's. Ex. 34):

"DEFINITION OF PROPERTY

"Wherever used in this bond Property shall be deemed to mean money, currency, coin, bank notes, Federal Reserve notes, postage and revenue stamps, U. S. Savings Stamps, bullion, precious metals of all kinds and in any form and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semi-precious stones, bonds, securities, evidences of debts, debentures, script, certificates, interim receipts, warrants, rights, puts, calls, straddles, spreads, transfers, coupons, drafts, bills of exchange, acceptances, notes, checks, money orders, warehouse receipts, bills of lading, withdrawal orders, conditional sales contracts, abstracts of title, insurance policies, deeds, mortgages upon real estate and/or upon chattels and upon interests therein, and assignments of such policies, mortgages and instruments, and other valuable papers and documents, and all other instruments similar to or in the nature of the foregoing, in which the Insured has an interest or which are held by the Insured for any purpose or in any capacity and whether so held gratuitously or not and whether or not the Insured is liable therefor.

* * * * * * * *

"THE LOSSES COVERED BY THIS BOND ARE AS FOLLOWS:

"FIDELITY

"(A) Any loss through any dishonest, fraudulent or criminal act of any of the Employees, committed anywhere and whether committed alone or in collusion with others, including loss of Property through any such act of any of the Employees.

"ON PREMISES

"(B) Any loss of Property through robbery, burglary, common-law or statutory larceny, theft, hold-up, or other fraudulent means, misplacement, mysterious unexplainable disappearance, damage or destruction, abstraction or removal from the possession, custody or control of the Insured (whether effected with or without violence or with or without negligence on the part of any Employee), and any loss of subscription, conversion, redemption or deposit privileges through the misplacement or loss of Property, while the Property is (or is supposed to be) lodged or deposited within any offices or premises located anywhere, except while in the mail or in

any of the Insured's offices specifically excluded from the coverage of this bond or with a carrier for hire other than an armored motor vehicle company for the purpose of transportation.

* * * * * * * * *

"THE FOREGOING AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS AND LIMITATIONS:

"Section 1. THIS BOND DOES NOT COVER:

(g) Any loss resulting directly or indirectly from trading, with or without the knowledge of the Insured, in the name of the Insured or otherwise, whether or not represented by an indebtedness or balance shown to be due the Insured on any customer's account, actual or fictitious, except when covered under Insuring Clause (A), (D) or (E)."

Against the foregoing bond the following facts are projected.

Appellants are stock brokers and one Thomas Guren was at all pertinent times a registered representative, a salesman or customer's man employed upon a commission basis by appellants. (J.A. 16, 20, 21)

In the summer of 1959, it was known that Television Shares Management was going to make a public offering of its stock for sale to the public "over the counter." (J.A. 21, 22)

Before its issue Guren had interested one Sekular in this stock, had related such interest to his employer through Leo Sade, a principal partner, on or about August 4th or 5th, and the employer was made aware that Sekular anticipated purchase of a large amount of the stock. (J.A. 113-115, 118) Sekular was a new and first-time customer of appellants without any established credit with appellants, but appellants made no credit check upon him at any time.

Thereafter the following transpired. Television Shares Management proceeded to complete its program for public offering, effective August 10, 1959, and pursuant to prior understandings Sekular had

deposited with Guren a check form, blank in every respect except for his signature and August. (J.A. 77, 63)

The testimony upon the trial of the case established that when his check was deposited by Sekular with Guren it was with the expressed understanding that appellants were to purchase an unspecified number of shares of Television Shares Management Company stock at an unspecified price per share with a total purchase however not to exceed $100,000.00 and with instructions to Guren that said check was to be completed and delivered only upon receipt by Sekular of confirmation by appellants to him of the perfection of the transaction by purchase of the shares. (J.A. 77)

On August 10th, appellants purchased on their own credit from an underwriter 2300 shares of the stock, specifying that the stock be delivered in form, "street and hold." The purchase price of said shares exclusive of commissions was $60,700.00. No further shares were thereafter ordered for Sekular because Guren, appellants' employee, thought it advisable to wait and so recommended, although up to $100,000.00 of said stock had been originally authorized by Sekular to be purchased. (J.A. 91)

On August 10, 1959, confirmations were sent by appellants to Sekular upon which forms were the notation that settlement therefore would be required within four days. Under Treasury Department Regulation "T," settlement was obliged to be made without exception within seven business days, failing which appellants were obliged to forthwith liquidate the customer's account. (J.A. 23, 24, 70)

On August 19, 1959, the seventh (7th) business day after purchase, appellants, through one of their partners in this action, Frances Mahon, accepted Sekular's uncompleted check in exactly the same form in which it had been delivered to Guren, and thereupon added a date, "19th," a payee, "Sade & Co." and an amount, "$61,440.55." (J.A. 63)

Frances Mahon had called on Guren for this check on August 19, 1959, and he delivered it to her. She knew that it had been extant since August 10, 1959. On that date, credit to the full amount of Sekular's purchase of shares of stock had been extended to him. This was a credit transaction and not one for cash. Nothing passed to Sekular which he did not already have. He got no certificates, nor for that matter were any ever issued to him or in his name. They remained in "street form" until December, 1959, when appellants disposed of them, so all that Sekular ever had was a bookkeeping entry on appellants' books and records which he at no time utilized by withdrawal, further purchase or in any other manner.

Appellants learned on August 20th, by telephone, that Sekular's check had been dishonored, and then Mr. Leo Sade immediately called him, demanding that he either make it good or be sold out. (J.A. 45, 46) With full knowledge of Sekular's inability to then pay in full for his purchase, and with Sekular's excuse that "something" had gone wrong, appellants thereafter solely on their own behalf on August 26, 1959, accepted a cash payment of $1,900.00 from him, despite the admonition of appellants' employee, Guren, to liquidate the account at once as required by regulation "T."

Thereafter, within a few days, appellants did liquidate the account in part, and thereupon filed a claim against the appellee which in no way implicated appellants' employee Guren in any dishonest, fraudulent or criminal act, either alone or in collusion with anyone else. This proof of claim was on appellee's form, was designated as such and was the only "Proof of loss" ever filed by appellants, although in later correspondence, appellants' counsel inferred collusion and wrongful actions of Guren, appellants' employee. (J.A. 48, 33, 34)

Several efforts were thereafter made through the United States Attorney's Office by appellants and their counsel to prosecute both the customer and appellants' own employee upon appellants' complaints,

but charges never issued nor was any prosecution ever commenced, as the District Attorney's Office concluded that no criminal action was indicated. (J.A. 71-73)

Appellants thereafter instituted their civil action below through a complaint which appellee read and considered as one asserting only a claim of appellants under coverage "A" of their bond, the language of which is set forth hereinbefore. (J.A. 2, 3) Appropriate defenses were filed and eventually the matter reached pretrial.

Thereat, appellants again clearly relied upon a claim under coverage "A" and the pretrial proceedings were concluded and signed by all counsel upon such basis. Thereafter, not at pretrial as appellants state in page 3 of their brief but after the same, the pretrial order was enlarged to encompass an illusory and apparently newly considered claim under coverage "B" of the bond to which appellee then objected. (J.A. 12) This amendment was made by appellants after the pretrial order had been signed by their counsel and by the examiner. (J.A. 12)

At trial, appellee stated its position of "trading loss" at the outset of the trial. (J.A. 16) The same was not raised sooner because this defense could only pertain to a loss identifiable under coverage "B" and no reliance under coverage "B" had been raised by appellants until after pretrial as indicated above.

From caution and in order to effect justice, the Court considered the "trading loss" defense only arguendo and it thereupon, in equal justice to appellants, permitted them to offer any and all evidence on such issue as they desired, continuing and extending the trial in order to bring all pleadings into proper position to justify all action which was at any time taken. (J.A. 135, 104, 105)

Eventually, and after extensive further hearings, a finding was indicated favoring appellee, whereupon, appellants immediately filed a

motion for a new trial. The motion alleged an inability to have produced witnesses. One such, Sekular, was obviously not required, nor was his wife, since the Court, even without the presence of either, denounced Mr. Sekular's actions as fraudulent, and as to any testimony from his wife, considered what she would have testified to if present, and still found for appellee. (J.A. 138, 139)

As to the other witnesses, no excuse can be found anywhere in the record for not having called them, nor can anything be found therein even suggesting how any testimony from any of them could have changed any material part of the trial or its result.

Following determination of the case adverse to appellants, this appeal followed.

RULE INVOLVED

Federal Rules of Civil Procedure, Rule 15

Amended and Supplemental Pleadings

(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

> (c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

SUMMARY OF ARGUMENT

Appellants had in effect in this case a BROKERS BLANKET BOND issued by appellees. That bond would have covered any loss which appellants as stock brokers might establish to have been sustained through a dishonest, fraudulent or criminal act of any of its employees either acting alone, or in collusion with another. This portion of the bond was entitled "Fidelity" and is herein usually referred to as "Coverage A" or "Clause A." It is extremely broad in its scope.

The trial court found, however, from the evidence that appellants had failed to establish any dishonest, fraudulent or criminal act on the part of their employee, Guren, and appellants have conceded that they have no point to raise on this appeal from that determination.

Alternatively, they claim a right to recover such sums as were allegedly lost by them through fraud practised upon them, and found by the trial court to have been perpetrated solely by a customer without collusion or participation therein by their employee. The loss which they so sustained was as a result solely of credit which they extended to the customer to purchase stock upon the customer's deposit with appellant of an undated, and as to amount and payee, an uncompleted check on a suburban bank. For this the customer at no time received anything of value from appellants, since they retained the shares of stock themselves, in "street form," and no subsequent sale or disposition of said shares, withdrawals or exchanges of the same by the customer were ever permitted, nor for that matter sought or attempted.

Appellants claimed that this transaction entitled them to recover under "Coverage B" of their bond.

"Coverage B" of the bond was entitled "On Premises" and it indemnified appellants from any loss of "Property" while said "Property" was or was supposed to be on or in any of appellants' premises, provided that such "Property" was lost through fraud, or other means not herein pertinent.

In addition to the "On Premises" provision a further and pertinent provision of the bond was its definition of "Property." As used in the bond, "Property" was clearly defined and described to be almost all inclusive of every kind of tangible personal property which could conceivably have any use or identification with the conduct and operation of a stock brokerage office. It did not include, specifically or by reference, credits extended to or for the account of customers.

The court below read the above provisions together and concluded that while the actions of appellants' customer, Sekular, were fraudulent, nevertheless no "property" as defined by the bond was withdrawn or lost from the premises and hence no relief was afforded under "Coverage B" of the bond.

Since appellants seriously urged that such loss did constitute a loss entitled to indemnity under "Coverage B," appellee thereupon deemed that Section 1(g), an exclusionary clause therein, could have a possible bearing under the facts as developed. That section excluded any recovery to appellants under "Coverage B" if the same resulted directly or indirectly from trading.

At pretrial nothing definitive was shown by appellants as to how Sekular's actions established any loss under "Coverage B." After the pretrial order had been signed by all counsel and by the examiner, it was amended to assert that appellants' claims were allegedly under "Coverage A and B" although it would appear that factually nothing was asserted in the order to establish a claim to any loss other than might be asserted under "Coverage A." Appellee objected to this change at the time it was made.

At the time of trial when called upon for an opening statement, appellee's counsel advised the court that appellee, while meeting the claim of employee dishonesty, fraud and collusion, nevertheless deemed the matter "nothing more than a trading loss." (J.A. 16)

When "trading loss" became an obvious factor, appellee moved the Court to amend its answer to include the defense specifically. The court properly granted such motion and without restriction, permitted appellants to offer evidence on "trading," to argue the point orally, and also to file a brief on the question, which they did. In the interest of justice, appellee submits that this was reasonable and proper, permissible under Rule 15(b)(c), Federal Rules of Civil Procedure, and was no abuse of judicial discretion.

The court below ultimately disposed of the case without necessarily reaching the point of "trading loss" although its opinion concludes that the matter could have been disposed of as a clear trading loss in the acceptable and well known meaning of the term. Harris v. National Surety Co., 258 Mass. 353, 155 N.E. 10. (J.A. 136)

Finally, after the trial was concluded, including the taking of additional testimony offered by appellants on the above point, oral arguments, and written briefs on all points, the court decided the case adversely to appellants. Appellants thereupon moved for a new trial. (J.A. 138, 139)

That motion made no point of any error alleged to have been committed by the court in the trial of the case, nor of any ruling or determination made thereat. It was based solely and entirely upon a claim that something further might be established if Mr. Sekular, Mrs. Sekular, and two unnamed Assistant United States District Attorneys could be permitted to testify in open court. As to the Assistant District Attorneys, appellee had three such under subpoena for the trial, and saw no need to use them since the happenings before them seemed undisputed from the testimony of all other witnesses who testified.

Furthermore, it had been stipulated at pretrial that all records from the office of the United States Attorney for the District of Columbia relating to appellants' complaints could be used. (J.A. 15) What more could be added does not appear.

As to Mr. and Mrs. Sekular's testimony, the court had already obtained full knowledge of every matter and fact that either of them could have related or testified to, either through Mr. Sade's testimony, or the examination of Mr. Guren. Appellants' motion in this regard was accordingly properly denied by the court.

ARGUMENT

I.

No "On Premises" Loss of Any "Property" Covered by Appellee's Bond is Established in This Case. (Coverage "B")

Appellants have deviously confused much of their appeal herein by comingling factual recitations of acts or actions of Guren and Sekular which they argued below were demonstrative of establishing a loss under Coverage "A" of appellee's bond to appellants. They have set forth this coverage in their statement of the case (Br. 3) and in their argument. (Br. 7, 8) These references are inappropriate. Appellants admit in their brief (p. 8) that they failed to establish any claim under Coverage "A" of appellee's bond, and their insistent reference to that clause is meaningless since the exclusionary clause which is thereafter involved (Section 1(g)), does not exclude any losses which might be otherwise included in Coverage "A."

Appellants' sole claim under Coverage "B" of appellee's bond is based upon the alleged fraud practised upon appellants by Sekular, alone, unassisted, and not acting in collusion with Guren in any manner, since the trial court so found, and since such finding is supported by substantial evidence. What then does the bond provide? It is, to repeat, therein stated:

"ON PREMISES

"(B) Any loss of Property through * * * other fraudulent means, * * * while the Property is (or is supposed to be) within any of the insured's offices covered under this bond * * *." (Emphasis added)

"DEFINITION OF PROPERTY

"Wherever used in this bond Property shall be deemed to mean money, currency, coin, bank notes, Federal Reserve notes, postage and revenue stamps, U.S. Savings Stamps, bullion, precious metals of all kinds and in any form and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semi-precious stones, bonds, securities, evidences of debts, debentures, script, certificates, interim receipts, warrants, rights, puts, calls, straddles, spreads, transfers, coupons, drafts, bills of exchange, acceptances, notes, checks, money orders, warehouse receipts, bills of lading, withdrawal orders, conditional sales contracts, abstracts of title, insurance policies, deeds, mortgages upon real estate and/or upon chattels and interests therein, and assignments of such policies, mortgages and instruments, and all other instruments similar to or in the nature of the foregoing, in which the Insured has an interest or which are held by the Insured for any purpose or in any capacity and whether so held gratuitously or not and whether or not the Insured is liable therefor."

Appellants had the burden of proving two basic matters in order to prevail in a suit against appellee for a recovery under Coverage "B" of appellee's bond.

The first of these was a loss through "fraudulent means." The trial court concluded that the means utilized by Sekular in establishing an account with appellants in which credit was extended to him was fraudulent. Appellee disputes the lower court's determination of this. It was a mixed question of fact and law and appellee believes that the facts admittedly established fall short of establishing fraud as a matter of law. However, the court did so rule and hence the first requirement may be deemed to have been met.

Regardless of this, however, it is only the loss of "Property," a second and most important requirement, through fraudulent means, that is protected by appellee's bond and "Property" so protected is itself clearly defined and spelled out in the bond itself. What is "Property" therefor became and remains a clear question of law when the nature of the property is not in dispute. Here it was not stock, nor any other tangible thing. Sekular got nothing, took nothing, nor at any time removed or even utilized anything on or from appellants' premises. There was no profit or gain to one and loss to another which is inherent in the removal of property from one's premises. There was only a loss to appellants resulting from credit recklessly granted by them to Sekular, and never any gain to him or anyone else acting for or with him. The claim thus asserted amounts to no more than that appellee should be obliged to indemnify appellants against an ordinary business loss, foolishly and carelessly created and resulting from their own lack of care.

Despite this obvious status of dealing between appellants and Sekular, appellants rely upon Coverage "B" under appellee's bond to claim that the transaction herein involved constitutes loss of property through fraud for which plaintiff should be entitled to recover. In support of their position appellants rely upon National Bank of Paulding v. Fidelity & Casualty Insurance Co., 131 F. Supp. 121, and other like cases.

It is significant that in these cases so cited, in which recovery was allowed upon a bond for "Property" allegedly lost upon or from the premises of the insured, the insured was, almost without exception, a bank and not a stock broker; that the transactions grew out of check kiting schemes whereby, upon the deposit of bad checks with the insureds, credit was granted upon which checks were immediately drawn upon the insured banks which were honored, and hence as the courts said, money was withdrawn, thus resulting in a loss of property either in or from the premises.

However, in the case at bar, the perpetrator of the alleged fraud at no time withdrew, nor was he permitted to withdraw any property from appellants' premises, even assuming that the credit shown in his account could be construed to be "Property" within Coverage "B" of the bond.

Appellee submits that under cases involving a "Broker's" bond rather than "Banker's" bond as relied upon by appellants and in those cases involving stock, bond, and security transactions rather than kited checks, it has been uniformly held that the losses so sustained are not insured under provisions for losses of "property" from premises, and furthermore such transactions as were disclosed by the evidence in this case constitute "Trading Losses," and thereby exclusions under appellee's bond from claim.

Appellee submits that of more significance and persuasion than National Bank of Paulding v. Fidelity & Casualty Insurance Company, supra, which is upon a banker's bond, is the case of Degener v. Hartford Accident & Indemnity Co., 92 F.2d 959 (3rd Circuit, 1937), which involved a Broker's Bond and in which case the bond contained language which appellee submits is not to be distinguished from that in the bond herein either in regard to this point, "On Premises" loss of "Property," or as to "trading losses" as to which this case will again be cited.

In Degener, it was held:

> "But for present purposes assuming, but only assuming, that the transaction was not a trading loss, defendant alleges another defense; namely, that the transaction, whatever it was, was not covered by the bond.
>
> "Now the bond indemnifies against loss, * * * of money, * * *, checks, * * *.
>
> "(B) Through larceny, * * * or other fraudulent means * * * while the property is within any of the Insured's offices covered hereunder, * * *.

> "The plaintiff's contention is that the loss was a loss of money, and that such money loss was caused by 'fraudulent means.' But while the plaintiff lost money in the transaction and Sterling brought about such money loss by 'fraudulent means' the question still remains what the policy stipulated as the money whose loss the policy indemnified against and the location of that particular money.
>
> * * *
>
> "* * * A bank credit, or a credit with an agent or broker, has no localization."

The Court held that tangible and not intangible property was involved in a "Property" "Loss From Premises" clause, and that accordingly there could be no recovery under the Broker's Bond. Appellee submits that in the case at bar the identical principles pertain and that this decision should be followed by this Court, as it obviously was by the trial Court.

Appellants' brief on this point cites several cases, but all of those cases except Paddleford v. Fidelity & Casualty Co. of N. Y., 100 F.2d 606, refer to banker's bonds rather than broker's bonds, and Paddleford is clearly distinguishable from this case in that the employee who was involved was clearly proven dishonest. Had this been proven in the instant case the "trading loss" exclusion, later herein referred to, would not have pertained and could not even have been raised as a defense since it did not pertain to losses claimed through Coverage "A" which covered employee dishonesty.

The Court below recognized the distinctions existing between the case at bar and the cases upon which appellants were relying and also recognized and met their claim that "Coverage B" should stand alone as permitting a recovery solely for Sekular's claimed fraud.

The Court stated:

> "As an alternative proposition, plaintiffs (appellants) assert that even though their claim may be barred under Clause (A), that they are still entitled to

> recover under Clause (B) on the basis of Sekular's fraudulent conduct alone." (Emphasis added)

The Court then rightfully read in conjunction therewith the bond's definition of property, saying that the two provisions must be read together to come to a proper determination.

It said:

> "Section (B) of the bond, as this Court interprets it, is an agreement to indemnify plaintiffs (appellants) for the theft or its equivalent, of certain "property" as defined in the bond, and is not to be broadened by the clause 'or other fraudulent means,' so as to include every loss resulting from fraud." Sade v. National Surety Corporation, 203 F. Supp. 680 (1962).

While the court properly based its determination that its interpretation of "property" as defined by the bond was an essential element to be established to support any claim under "Coverage B," appellee submits that arguendo appellants failed to establish any compensible loss from Sekular's actions in any event and whether the same was "property" or not, for the following reasons.

As has been hereinbefore stated, upon Sekular's order to appellants, they upon their credit purchased stock and opened an account in Sekular's name. They received the stock shares in "street form" and retained it at all times in such form. What they paid was the equivalent of the market value of the stock when they purchased it. Thus for their money they had stock. This was not delivered to Sekular, nor was he ever permitted to sell or utilize any of it in any way. Appellants thus had no loss merely from their purchase of stock.

The value of the stock declined, but obviously this was not due to "the fraudulent conduct" of Sekular, who then neither owned, controlled, nor in any manner could control, use or disposal of the same. The decline in value was purely a result of the market and not of Sekular's actions.

Appellee submits that it is apparent from any view of the evidence in this case that no claim under "Coverage B" of its bond was established and that the trial court did not err as to this.

II

The Defense of "Trading Loss," Even Though Not Deemed Determinative by the Trial Court, Could As a Matter of Law Have Been Controlling and Dispositive of the Case, and Was Properly Permitted to be Pleaded and Considered.

Appellants urge that since appellee did not include a defense of "trading loss" in their answer, or at pretrial, it should be excluded and now disregarded, if it does have any effect.

In this connection, appellee refers this Court first to appellants' complaint. The language therein beyond dispute spells out a claim only of employee dishonesty or collusion, a claim obviously only under "Coverage A." Exclusion of recovery under the "trading loss" provision under the bond itself does not bar recovery under any claim established under "Coverage A," and would accordingly have been no legal defense to plaintiffs' (appellants') complaint.

At pretrial, the "Undisputed Facts," together with appellants' assertions (J.A. 9, 10), do not by even the remotest interpretation spell out an "On Premises" loss of "Property," as to which appellee would have been obliged to have plead the exclusionary clause. After the pretrial order was signed by counsel and the Examiner, not at pretrial, appellants for the first time asserted loss under "Coverage B." Appellee objected to this, but the order was not further amended (J.A. 12), this claim appearing therein as a footnote.

At the outset of the trial appellee asserted its reliance upon "trading loss" and appellants took no position opposed thereto, after which the trial proceeded. (J.A. 16)

Before the Court had made any disposition whatever of the case and when the defense of trading loss had appeared to be one of substance, appellee duly moved the court pursuant to Rule 15(b)(c), Federal Rules of Civil Procedure, to amend its answer to assert on the record a defense which it believed had become material, and the Court allowed such amendment to be made with corollary rights reserved to appellants to offer evidence upon the issue and also to brief the Court on the law. Appellants did both, after which the Court decided that, while the point had been raised, it nevertheless decided the case as being one not covered by "Coverage B" under the bond and therefor treated "trading loss" as being beyond a question necessarily decided by it.

After permitting amendment, the Court below first clearly and unequivocally found that appellants were not entitled to recover under "Coverage B." (J.A. 133-135) It then went on to assume arguendo that if the claimed loss was one under "Coverage B," nevertheless, even under such assumption, no relief was afforded to appellants.

If this Court should conclude that but for application of the exclusionary trading loss clause, "Coverage B" could pertain, then appellee would submit that 1) under the facts and posture of the case below, appellee was clearly entitled to amend its pleadings to conform its pleadings to the proof under the sanctions of Rule 15(b)(c), Federal Rules of Civil Procedure, and 2) that the "trading loss" exclusion clearly barred any recovery by appellants.

On the first point, the case was tried under pleadings and a pretrial order which from their recitations clearly indicated that appellants were at best relying upon a "Coverage B" recovery only remotely, and that appellee had objected to this after-thought interjection of "Coverage B" into the pretrial proceedings although it did to some extent at least protect itself in its open court pronouncement of position to the Court as to this claim. (J.A. 16)

When it appeared necessary to fully protect the record on the point, appellee did duly move the court thereupon (J.A. 104), and appellants were permitted to offer any further evidence in regard thereto which they wished to do. (J.A. 105) This they did. (J.A. 109-126)

An amendment of pleadings to conform to the evidence is permitted under Rule 15, Federal Rules of Civil Procedure, and may be done even after judgment. This rule is clearly projected to effect substantial justice, and, in this case, even though the Court did not decide the case upon the amended defense, it permitted appellants to produce any and all additional evidence related thereto that they desired to produce. The purpose of the rule is to effect substantial justice and substantial justice was herein effected.

Appellee does not argue with appellants that pretrial proceedings are calculated to fix the future conduct of proceedings, but appellee does say that a plaintiff (appellants) should be as well prepared at pretrial to assert their entire case as they might thereafter urge should pertain to defendant.

Accordingly, appellee urges that Rule 15 is just as important herein as Rule 16, upon which appellants rely, and the action of the trial court in permitting appellee to amend its answer to set forth the specific defense of "trading loss" was proper and the allowance of such is not subject to review on appeal except for abuse of the court's discretion, as to which no claim is herein made. Joyce v. L. P. Steuart, Inc., 227 F.2d 407, Tillman v. National City Bank of New York, 118 F.2d 631, Hall v. National Supply Company, 270 F.2d 379, and Gallon v. Lloyd-Thomas Company, 264 F.2d 821.

On the second point, though not determinative of the issues, appellee agrees with the lower court that even if "Coverage B" might otherwise apply, any recovery thereunder was nevertheless barred under the "trading loss" exclusionary provision of the bond upon the following decisions and for the following reasons.

A trading loss exclusion in a broker's bond must obviously appear to the Court to be a usual and necessary provision in a broker's bond as distinguished from a banker's bond, for if no such preclusion was provided, the door would be wide open to any stock brokerage firm to engage in, and to permit, limitless transactions upon scanty or no credit investigation with absolute assurance through the bond that, if the creditor was unworthy, the bonding company would nevertheless protect its transactions.

There was not a single item of "Property" as defined in appellants' bond lost by it as a result of its customer's actions nor by its employee's actions, and, as above stated, under broker's bond cases no recovery has been allowed under such circumstances, the occurrences being normally determined to result from trading losses and thereby not recoverable under the bond.

In Earl v. Fidelity & Deposit Co., 138 Cal. App. 435, 32 P.2d 409, a broker's employee deliberately misrepresented a customer's margin deposit amount to his employer, stating that it was adequate, when in fact there was none. Stock purchase orders were put through in reliance thereon which resulted in the necessity of obtaining $38,000.00 from the purchaser to in fact bring his margin requirements into compliance.

The employee went to the customer, got a postdated check and delivered it to his employer. Payment on the check was refused, and the stock was thereupon sold with a resulting loss to the broker of $10,085.00. The broker having a bond similar to that herein involved brought suit thereon.

The Court held that the above loss resulted from a trading loss and was hence precluded from recovery under the bond, reversing an original finding for plaintiff, and in its opinion stated as follows:

"During the trial, plaintiff called to the stand two witnesses who were engaged in the brokerage business who were characterized by plaintiff's counsel as 'expert witnesses.' To each was propounded what was termed a hypothetical question, which consisted of a recital of the testimony of plaintiff's witnesses as to the conversations and events relating to the Stein orders and their execution. At the close of this recital the witness was asked, 'Assuming all of the foregoing facts to be true, have you an opinion as to whether or not the loss of the sum of $10,085 resulted directly or indirectly from trading actual or fictitious; if so, what is that opinion?' Over defendant's objections, both witnesses were allowed to express an opinion, which in each instance was in the negative.

"In urging a reversal of the judgment, appellant places its main reliance on the contention that the loss suffered by plaintiff was clearly shown to have resulted 'from trading' and that defendant had specifically excepted such losses from its liability under the policy in the following paragraph: 'This bond does not cover—(f) Any loss directly or indirectly from trading, actual or fictitious, whether in the name of the Insured or otherwise, and whether or not within the knowledge of the Insured, and notwithstanding any act or omission on the part of any employee in connection therewith, or with any account recording the same.'

"[1-3] That the loss was one suffered in a trading transaction cannot successfully be disputed. It is true two of plaintiff's witnesses, in response to hypothetical questions, over defendant's objections testified in their opinion that the loss was not suffered directly or indirectly from trading, but these opinions were erroneously admitted by the court. The question propounded to these witnesses was one for determination by the court and not a proper question for a witness' conclusion. If the issue involved was that the word 'trading' as used in the bond had a limited or peculiar meaning when used by brokers and bonding houses in the writing of such indemnity policies, it would have been proper to have offered the testimony of some qualified witness to show such meaning. The hypothetical question called for a widely different answer than that which would have been proper in showing the accepted meaning of the term when used under the circumstances here involved.

To like effect that only a question for determination by the Court arises around interpretation of a trading loss exclusion is the case of Rath v. Indemnity Insurance Co. of North America, 2 Cal. App. 2d 637, 38 P.2d 435, wherein the court stated:

> "The Court erred in overruling the objection to the admission of expert testimony as to whether the acts described constituted trading and as to whether the loss suffered therefrom was a trading loss. That was a question for the determination of the court, which, under the circumstances, was competent to attach to the word its ordinary and common meaning; there being no question raised as to its having any peculiar or limited meaning as employed in the text of the bond. That the loss suffered occurred in a trading transaction is obvious, in the light of common and well-known meaning of the term 'trading,' when used in connection with the purchase and sale of securities.
>
> "Under the terms of the exonerating provision of the bond, it is immaterial whether the loss in a trading transaction was occasioned by the dishonest act of an employee or not. The very language and its place in the contract carry conviction that the exonerating clause limited the dishonesty clause, and has the effect of relieving the surety from liability for any dishonest act of an employee committed in a trading transaction resulting in loss."

In the case at bar, dishonest acts of an employee would not have precluded a trading loss, but for all other purposes, it is obvious that in the case cited, "trading loss" should be given its usual, well-known meaning.

To like effect is the case of Kean v. Maryland Casualty Co., 221 App. Div. 184 (New York, 1927), affirmed in 248 N.Y. 534, by a bench including such Judges as Cardozo, Pound, Lehman, et al. Action was therein brought upon a broker's bond wherein the provisions were practically identical with those in the present case. Recovery was denied for several reasons, one of which was a trading loss exclusion, as to which the court stated:

"It would also seem that the transaction between the plaintiffs and Borden & Knoblauch falls within the exception of the bond of any loss directly or indirectly from trading. This exception in the bond provides (quoting),

"The plaintiffs insist that the word 'trading' should be held to include only a transaction where the parties acted as sellers and not as brokers. This contention, however, overlooks the entire wording of the exception, which is much broader than the word 'trading' standing alone. The transaction in question was, as noted, a part of a running account between the plaintiffs and Borden & Knoblauch, and the payment was a flat sum to be credited on this account and less than the value of the securities. The loss, therefore, whether regarded as arising directly or indirectly, clearly grew out of a trading account."

In the present case, appellee's bond precluded any recovery under "Coverage B" therein if the loss was a trading loss, this by virtue of Section 1 (g) which stated as follows:

"Section 1. THIS BOND DOES NOT COVER:

"(g) Any loss resulting directly or indirectly from trading, with or without the knowledge of the Insured or otherwise, whether or not represented by an indebtedness or balance shown to be due the Insured on any customer's account, actual or fictitious, except when covered under Insuring Clause (A), (D) or (E)."

Appellants offered testimony in an effort to establish that "trading" as used above meant only transactions in which the broker was acting on his own behalf, a position taken by the broker in some of the cases above cited. No such claim had been made at any time by pleading or otherwise earlier in the case, and the evidence offered fell flat when the same Mr. Riviera upon whom appellants rely in their brief (Br. 17, 18), clearly testified that "trading" is all inclusive whether as principal or broker.

This witness testified:

"So trading is a purchase or sale for the account of a principal, the principal may be the firm, the principal may be a client.

"THE COURT: So that trading doesn't necessarily refer to broker alone?

"THE WITNESS: That is correct. The client may be trading, usually is, for example in a New York Stock Exchange stock the client is trading * * *

* * *

"THE COURT: But when you have a provision in an insurance policy speaking about a trading loss without mentioning whether it refers to a broker or dealer, you can't tell what it means?

"THE WITNESS: I would assume, Your Honor, it would apply to any trading loss. So far as I know, Lloyds will insure a trading loss and one could, in this country * * *." (Emphasis added) (J.A. 119, 120)

The court below on testimony, as above, and upon the authority of Earl v. Fidelity & Deposit Co., Rath v. Indemnity Insurance Co., Kean v. Maryland Casualty Company, and Harris v. National Surety Company, supra, concluded that the loss herein was excluded as a trading loss.

Appellants have herein relied upon Paddleford v. Fidelity Casualty Co. of New York, supra, as being opposed to Judge Youngdahl's holding herein. Paddleford is not opposed to Judge Youngdahl's holding but is inapplicable under the facts and is clearly distinguishable in light of the bond provisions which it interpreted. It does not appear to have received any following in any cases similar to the one herein.

On the other hand, the cases cited and relied upon by appellee are consistently followed with approval as being authoritative for determination of claims upon bonds having similar if not identical provisions with those herein. In this connection appellee refers the Court to Roth v. Maryland Casualty Co., 209 F.2d 371 (3rd Cir. 1954), as being the latest case which it has found on the question, and which adopts with approval the other cases upon which appellee is relying.

III

The Trial Court Did Not Err in Refusing to Grant Appellants a New Trial on Either Their Timely Motion Seeking the Same, or Upon Their Supplemental Motion.

The impact of appellants' argument on this point is that they now claim that they were not able to locate Ann Lewis Sekular or Stanley Sekular as witnesses at the time of trial, but that if they had located them and if they had testified, the testimony of Ann Lewis Sekular would have established collusion and fraud between Stanley Sekular and Thomas Guren.

Appellants then assert that in so proving such collusion and fraud a recovery under "Coverage A" would be established.

It is significant that the record in this case is devoid of any subpoenas to either Mr. or Mrs. Sekular, and that at no time during the interval of nearly two years while the case was pending did appellants serve any notice of, or make any effort to take the deposition of either of them. This lack of diligence of appellants' original attorneys (not their present counsel) is weakly excused in their brief with the explanation that Mrs. Sekular was a competent but not compellable witness as to her husband.

Presumably this is what original counsel meant in his Supplemental Motion For New Trial when he stated that diligent efforts were made to take the depositions of the witnesses Sekular, but the same could not be taken "because their counsel refused to allow them to, on the grounds of marital privilege." (J.A. 139)

Appellee's counsel, who did not in any way represent either of the Sekulars, had no knowledge of any such declination and there is absolutely not a single item in the record in this case to support this unsworn statement of appellants' trial counsel.

This point raised by appellants is inconsistent with their remaining points on appeal. They conceded and flatly stated in their brief, page 8, "Appellants, therefore, for the purpose of this appeal will not rely on Clause (A)." Despite this waiver of any claim on Clause (A) all of the testimony which appellants would have elicited could and would pertain only to Clause (A) and would be immaterial as to a Clause (B) loss for the Court found, even without the testimony of him or his wife, that Sekular was fraudulent but that no "On Premises" loss of "Property" was sustained by appellants due to that fraud.

Despite the physical absence of Mrs. Sekular as a witness during the trial, appellants got the full benefit and advantage of her testimony through Leo Sade, for the court allowed him to testify as to what Mrs. Sekular had stated regarding the alleged collusion (J.A. 36), and furthermore, through Mr. Guren, who was extensively cross-examined concerning Mrs. Sekular's statements (J.A. 99-101).

When appellants filed their motion, everything that Mrs. Sekular could have testified to was already before the court. In addition, however, to the Sekulars, appellants wanted to call two assistant United States Attorneys to testify. No excuse for not having called them or to have at least subpoenaed them for the trial was shown. The record of the Court below, filed herein, will disclose that appellee subpoenaed three of such assistants, but when there was no contradiction as to what transpired before them they were not called or used as witnesses by appellee (J.A. 140, 141), nor were they ever called by appellants.

Appellants point to nothing to support any claim that the trial court in any way abused its discretion in denying either their motion or their supplemental motion for a new trial and it is fundamental law that a motion for a new trial is directed to the discretion of the trial court and will not be disturbed on appeal except for abuse. Ruppert v. Ruppert, 77 U.S. App. D.C. 65, 134 F.2d 497.

Appellants do not herein even reach a status of "newly discovered evidence" which might under some circumstances have justified a new trial and it is submitted that their contention in this appeal on this issue borders upon being frivolous. Judge Youngdahl nevertheless gave due consideration to the self same points which they raised below, and which are again raised in this appeal and disposed of them in a Memorandum and Order which is clearly indicative of the exercise of his judicial discretion and with equal clarity negates any abuse of that discretion. (J.A. 141, 142)

CONCLUSION

Appellants failed entirely to prove any loss whatever either covered, or even intended to be covered, by the bond issued to them by appellee. They extended credit carelessly to a customer in an unusual and large transaction but they never parted with or lost any "Property" tangible in nature or having any intrinsic value from the premises through the transaction.

Appellee's bond was not issued to endorse or guarantee customers' bad checks. The decision of this case by the trial court was correct in every respect and its judgment should be affirmed.

Respectfully submitted,

HARRY L. RYAN, JR.

815 - 15th Street, N. W.
Washington 5, D. C.

Attorney for Appellee